TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

No. 218.

IROQUOIS TRANSPORTATION COMPANY, CLAIMANT OF THE STEAMER "WINNEBAGO," &c., PLAINTIFF IN ERROR,

vs.

DE LANEY FORGE AND IRON COMPANY.

No. 219.

IROQUOIS TRANSPORTATION COMPANY, CLAIMANT OF THE STEAMER "WINNEBAGO," &c., PLAINTIFF IN ERROR,

vs.

GEORGE W. EDWARDS, FRANK W. EDDY, AND GEORGE W. EDWARDS, EXECUTOR OF THE ESTATE OF H. D. EDWARDS, DECEASED, COPARTNERS AS H. D. EDWARDS & COMPANY.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MICHIGAN.

FILED MARCH 12, 1906.

(20,122 and 20,123.)

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INDEX.

	Original.	Print.
Transcript from the circuit court of Wayne county	1	1
Complaint	1	1
Exhibit A—Statement of account	4	3
Answer of claimant	5	4
Opinion	11	9

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., AUGUST 28, 1906.

	Original.	Print.
Judgment	15	13
Claim of appeal	16	13
Bond on appeal	16	14
Stipulations as to evidence	19	16
Evidence for complainant	20	17
Testimony of William Robbins	20	17
Harry Lovejoy	51	38
J. G. Hamblen, Jr.	64	46
Amos R. Robbins	65	47
Exhibit 1—Letters, Columbia Iron Works to Delaney Forge and Iron Co., July 11, 1902, October 21, 1902, and November 5, 1902	80	57
Testimony of Mr. Robbins (recalled)	81	58
Letter, Columbia Iron Works to Delaney Forge and Iron Co., December 31, 1902	82	58
Letter, Columbia Iron Works to Delaney Forge and Iron Co., January 5, 1903	83	59
Letter, Columbia Iron Works to Delaney Forge and Iron Co., January 10, 1903	83	59
Letter, Columbia Iron Works to Delaney Forge and Iron Co., January 12, 1903	84	59
Letter, Columbia Iron Works to Delaney Forge and Iron Co., January 16, 1903	84	59
Letter, Columbia Iron Works to Delaney Forge and Iron Co., January 23, 1903	84	59
Letter, Columbia Iron Works to Delaney Forge and Iron Co., January 24, 1903	85	60
Letter, Columbia Iron Works to Delaney Forge and Iron Co., January 26, 1903	85	60
Letter, Columbia Iron Works to Delaney Forge and Iron Co., February 2, 1903	85	60
Letter, Columbia Iron Works to Delaney Forge and Iron Co., February 18, 1903	86	60
Letter, Columbia Iron Works to Delaney Forge and Iron Co., March 2, 1903	86	60
Letter, Columbia Iron Works to Delaney Forge and Iron Co., March 3, 1903	86	61
Letter, Columbia Iron Works to Delaney Forge and Iron Co., March 12, 1903	87	61
Letter, Columbia Iron Works to Delaney Forge and Iron Co., March 19, 1903	87	61
Letter, Columbia Iron Works to Delaney Forge and Iron Co., March 24, 1903	88	62
Letter, Columbia Iron Works to Delaney Forge and Iron Co., March 30, 1903	89	62
Letter, Columbia Iron Works to Delaney Forge and Iron Co., April 13, 1903	89	63
Letter, Columbia Iron Works to Delaney Forge and Iron Co., April 16, 1903	89	63
Letter, Columbia Iron Works to Delaney Forge and Iron Co., May 4, 1903	90	63
Letter, Columbia Iron Works to Delaney Forge and Iron Co., May 27, 1903	91	64

	Original.	Print.
Letter, Columbia Iron Works to Delaney Forge and Iron Co., June 16, 1903	91	64
Letter, Columbia Iron Works to Delaney Forge and Iron Co., June 23, 1903	92	64
Letter, Columbia Iron Works to Delaney Forge and Iron Co., June 24, 1903	92	64
Letter, Columbia Iron Works to Delaney Forge and Iron Co., June 25, 1903	92	65
Testimony of Mr. Robbins (recalled)	93	65
Exhibits 11 and 12—Notices of August 25, 1903	94	66
Testimony of Thomas J. Moran	95	66
Exhibit 15—Bill of sale of the "Winnebago"	98	68
Testimony of Thomas J. Moran (recalled)	99	69
Plaintiff rests	101	70
Evidence for defendant	101	70
Testimony of Frank B. Jenks	101	70
Exhibit 17—Receipt, Columbia Iron Works to Iroquois Transportation Co., July 19, 1903	103	71
18—Agreement, Columbia Iron Works with Iroquois Transportation Co., July 18, 1903	103	71
19—Letter, Delaney Forge and Iron Co. to Columbia Iron Works, June 4, 1903	105	73
20—Letter, Delaney Forge and Iron Co. to Columbia Iron Works, June 5, 1903	106	73
21—Letters, Delaney Forge and Iron Co. to Columbia Iron Works, June 18 and 27, 1903	106	73
Testimony of Capt. Moran (recalled)	114	78
Mr. Jenks (recalled)	117	80
Capt. Moran (recalled)	117	81
Roy M. Van Vleet	120	82
Defendant rests	124	85
Evidence for complainant	124	85
Testimony of A. S. Robbins (recalled)	124	85
Stipulation as to Exhibits 2, 3, 4, 5, 6, 7, and 8	125	86
Exhibit 10—Note of June 15, 1903	127	87
13—Enrollment	128	88
15—License	130	89
16—Contract of March 8, 1902	131	89
Intervening complaint	135	92
Exhibit A—Account	139	95
Answer to intervening complaint	140	95
Opinion on intervening complaint	148	100
Judgment on intervening complaint	150	102
Claim of appeal	151	103
Bond on appeal	151	103
Stipulation as to evidence	155	106
Evidence for complainant	156	107
Testimony of Frank W. Eddy	156	107
Joseph A. Bower	159	109
Mr. Eddy (recalled)	160	110
Exhibit 2—Letter, Edwards & Co. to Columbia Iron Works, August 28, 1902	164	112

	Original.	Print.
Testimony of Robert C. Baxter	173	118
Capt. Thomas J. Moran	177	121
Harry O. Lovejoy (not set out)	182	123
Complainant rests	182	124
Evidence for defendant	182	124
Testimony of Roy M. Van Vleet	182	124
Charles E. Kremer	186	126
Exhibit G—Deposition of Harry O. Lovejoy	189	128
2—Letter, Edwards & Co. to Columbia Iron Works, February 25, 1903	196	133
Letter, Edwards & Co. to Columbia Iron Works, February 27, 1903	197	133
Letter, Edwards & Co. to Columbia Iron Works, March 7, 1903	198	134
Letter, Columbia Iron Works to Edwards & Co., March 24, 1903	198	134
Letter, Edwards & Co. to Columbia Iron Works, March 30, 1903	199	134
Letter, Columbia Iron Works to Edwards & Co., March 31, 1903	199	135
3—Receipt, April 4, 1903	200	135
4—Receipt, May 6, 1903	200	135
5—Receipt, April 27, 1903	200	135
6—Receipt, June 1, 1903	200	136
Exhibits A, B, and C—(Not set out)	200	136
Exhibits D, E, F, H, and 16—(Not set out)	201	136
Motion to amend answer in Delaney Forge and Iron Co. case	202	136
Motion to amend answer in Edwards' case	203	137
Brief in opposition to motions to amend answers	204	138
Order denying motions to amend answers	208	140
Order of submission	209	141
Opinion	210	141
Judgment for the intervenors	219	146
Judgment for the complainant	220	147
Petition for writ of error	221	147
Allowance of writ of error	222	148
Writ of error in Delaney Forge and Iron Co. case	223	149
Bond to Delaney Forge and Iron Co	225	150
Citation to Delaney Forge and Iron Co.	227	151
Assignment of errors	228	151
Clerk's certificate	230½	153
Writ of error in Edwards & Co. case	231	154
Bond to Edwards & Co	233	155
Citation to Edwards & Co	235	156
Assignment of errors	236	157
Clerk's certificate	239	159

1 *Complaint.*

STATE OF MICHIGAN:

Circuit Court for the County of Wayne.

The complaint of the De Laney Forge & Iron Company against the steamer "Winnebago," her engines, boilers, machinery, boats, tackle, apparel and furniture, and against all persons lawfully intervening for their interests therein, in a cause of contract, alleges as follows:

First: That at and during the several times hereinafter mentioned the said complainant was and now is a corporation organized and existing under and by virtue of the laws of the State of New York, and having its principal office in the City of Buffalo, in said State.

Second: That the said steamer "Winnebago" is a water craft of above five tons burden, used and intended to be used in navigating the waters of this State, and that said steamer is also used and intended to be used upon the Great Lakes and their connecting waters; that the construction of said ship was recently completed at the yards of the Columbia Iron Works, near St. Clair, Michigan. That the work of construction of said ship was done for the Iroquois Transportation Company, as complainant is informed and believes, which said Iroquois Transportation Company, as complainant is informed and believes, is a corporation of the State of Indiana, and is now, through its said contract for construction with said Columbia Iron Works, the owner of said ship; and that, as complainant is informed and believes, the said ship was built by her owners or their agents with the intent and purpose of being so used in navigating said lakes and waters, and that they so intended to use said vessel during all the time she was being built.

Third: That in or about the months of November and December, 1902, and January, February, April and July, 1903, the said vessel being in the course of construction as a steam propeller, at or near St. Clair, Michigan, your complainant, at the request of the Columbia Iron Works, the corporation engaged in building said vessel, did furnish certain forgings and materials in and about the building, fitting, furnishing and equipping said craft as a steam propeller, more particularly set forth in Exhibit "A" hereto attached; and your complainant avers that said forgings and materials were actually used in and about the fitting, furnishing and equipping of said steamer, and that for said forgings and materials said builders agreed to and with said complainant to pay said complainant the amount of money stated in the said schedule.

2 Fourth: That said forgings and materials are reasonably worth the sum of money charged for them in said schedule.

Fifth: That there is now due said complainant for the forgings and materials so as aforesaid furnished the sum of one thousand, nine hundred ninety-nine and 90-100 ($1,999.90) dollars, and interest thereon, and that no part of same has ever been paid.

Sixth: That the said contract for furnishing the forgings and materials aforesaid was made and performed by said complainant, and the said forging and materials were accepted and used, and intended to be accepted and used, as aforesaid, in the State of Michigan. That at the time of the making of said contract for the furnishing of said forgings and materials said vessel, as complainant is informed and believes, was then upon the land in said State of Michigan, and not in the water, and had never been in the water, and had never been launched; and that at the time of the making of said contract it was the intent of both said complainant and the parties to whom said forgings and materials were furnished that a large part of said forgings and materials should be placed in the said vessel before she was removed from the land or launched or placed in the water; and that at the time the said complainant was furnishing the greater part of said forgings and materials the said vessel, as complainant is informed and believes, was then upon the land in the State of Michigan, and had never been in the water, and had never been launched; and that a large part of said forgings and materials, as complainant is informed and believes, previous to her being launched, were placed in her and attached to her while she was yet an incompleted and unfinished vessel, and while she was upon the land, before she was launched or placed in the water. That complainant further avers that any of said forgings and materials that were not placed in said vessel previous to her being launched have since been placed in her and attached to her. That at the time of the making of the said contract and at the time the said complainant performed the same by the delivery of said forgings and materials, and at the time the same were so placed in said vessel, the said vessel, as complainant is informed and believes, had not been completed, and, not being completed, had not been licensed or enrolled under the Acts of Congress.

3 Seventh: That some time ago, to-wit: about August 25th, 1903, your complainant served notice of its claim of lien against said steamer for the forgings and materials furnished as aforesaid, such notice being served on the Iroquois Transportation Company, who, complainant is informed and believes, was and is the owner of said vessel; and your complainant hereby reasserts its right of lien as aforesaid under the statutes of this State in such case made and provided.

Eighth: That all and singular the premises are true.

Wherefore complainant prays that process in due form, according to the course and practice of this court under the statute in such case made and provided, may issue, directed to the sheriff of said county, commanding him to seize and safely keep said steamer "Winnebago," her engines, boilers, machinery, boats, tackle, apparel and furniture to answer all such liens as shall be established against it according to law, and make return of his proceedings under such warrant, pursuant to statute, and also that, pursuant to said statute, a summons to the owner or master of said steamer be issued in due form and that judgment may be rendered in favor of said complainant for its claim aforesaid, and that the same may be satisfied and the said complainant's said lien against said steamer may be

enforced according to the statute in such case made and provided; and that said complainant may have such further, other or different relief in the premises as the nature of this case may entitle it to.

DE LANEY FORGE & IRON COMPANY,
By SHAW, WARREN, CADY & OAKES,
Its Attorneys.

SHAW, WARREN, CADY & OAKES,
Union Trust Bldg., Detroit, Mich.,
Attorneys for Complainant.

STATE OF MICHIGAN, *County of Wayne, ss:*

Herbert K. Oakes, being duly sworn, deposes and says that the complainant in the foregoing complaint is a foreign corporation, and that no officer of said corporation is at present, as deponent verily believes, within the State of Michigan; that he has read the foregoing complaint and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters therein stated to be on information and belief, and as to those matters he believes it to be true; and that he had authority to execute the foregoing complaint for and on behalf of the De Laney Forge & Iron Company.

(S'g'd) HERBERT K. OAKES.

Subscribed and sworn to before me this 3rd day of October, 1903.

(S'g'd) JOSEPH G. HAMBLIN, JR.,
Notary Public, Wayne County, Mich.

My commission expires January 22, 1904.

4 EXHIBIT "A."

Boat No. 1—"Winnebago."

1902.			
Nov. 24,	1	steel pin, 22¾ inches long	$20.75
	1	steel pin, 39½ inches long	36.85
	1	steel pin, 33½ inches long	31.05
	3	steel crank pins	58.15
26,	1	steel collar shaft	45.35
Dec. 4,	1	steel outboard shaft	115.50
13,	1	rudder frame	536.80
15,	1	steel thrust shaft	155.85
1903.			
Jan. 14,	3	steel crank webs	189.00
21,	3	steel crank webs	185.67
Feb. 7,	3	steel connecting rods	314.45
28,	3	steel columns	151.38
Apr. 30,	1	quadrant	69.84
	3	steel valve stems	38.28
	3	steel connecting rod caps	31.60
July 16,	1	tiller	45.00
			$2,025.52

CREDITS.

Nov. 24,	By freight	.....	$382	
26,	"	.....	118	
Dec. 4,	"	.....	300	
13,	"	.....	436	
15,	"	.....	270	
Jan. 14,	"	.....	273	
21,	"	.....	268	
Feb. 7,	"	.....	240	
28,	"	.....	245	
July 16,	"	.....	30	
			——	25.62
				$1,999.90

We herewith certify that the above items are correct in every particular.

DE LANEY FORGE & IRON CO.
WM. A. ROBBINS, *Sec'y.*

5 STATE OF MICHIGAN:

To the Circuit Court for the County of Wayne.

DE LANEY FORGE & IRON COMPANY
vs.
STEAMER "WINNEBAGO," ETC.

Answer of Claimant.

The answer of the Iroquois Transportation Company, owner and claimant of the steamer "Winnebago," to the complaint of the Delaney Forge & Iron Company, respectfully shows: the Iroquois Transportation Company saving and reserving to itself all manner of benefit and advantage of exception to the many errors, defects and insufficiencies in said complaint contained, for answer to so much and such parts thereof as it is advised it is material and necessary for it to make answer unto, says:

1st. That this respondent is a corporation duly organized and existing under the laws of the State of Indiana, and maintains its principal office at Michigan City, Indiana, and also an agency at Chicago, Illinois, and that it is financially responsible, and at the time of the filing of the complaint herein was the sole owner of the steamer "Winnebago."

2nd. This claimant has no knowledge as to whether the complainant is a corporation, as alleged in the first article of the complaint, and therefore demands strict proof of the allegation.

3rd. This claimant admits that the steamer "Winnebago" is a water craft of above five tons burthen, and that she is used, or intended to be used, upon the Great Lakes and their connecting waters, but denies that the said steamer is used or intended to be used in

navigating the waters of the State of Michigan. This claimant admits that the said steamer was constructed for it, and that it is a corporation of the State of Indiana, and that it had made a contract for the construction of the said steamer with the Columbia Iron Works, but denies that the said steamer was built with the intent and purpose of being used to navigate the waters of the State of Michigan.

4th. This claimant admits that during the time mentioned in the third article of the complaint the said steamer was in course of construction as a steam propeller at or near St. Clair, Michigan.

Claimant has no knowledge whatever of the furnishing of the forgings and materials which it is alleged were furnished to the said steamer at the request of the Columbia Iron Works.

6 Claimant has no knowledge as to whether the said forgings and materials were actually used in and about the fittings, furnishing and equipping of the said steamer, or whether the said bills for the same were paid. As to these matters the claimant demands strict proof.

5th. Claimant has no knowledge as to the value of the said forgings and materials, and therefore demands strict proof of the same.

6th. Claimant denies that there is due the complainant from the said steamer "Winnebago" or this claimant the sum of nineteen hundred and ninety-nine and 90-100 dollars ($1,999.90) and interest thereon.

7th. Claimant has no knowledge as to where the contract for the furnishing of the forgings and materials set up in the complaint was made or performed, and therefore demands strict proof thereof.

Claimant has no knowledge as to whether or not the said steamer was in the water or on land at the time the material, etc., as set up in the complaint, was furnished. Neither has claimant any knowledge as to whether any part of the said forgings and material were placed in the said vessel before she was launched or after she was launched, or while she was upon the land, or while she was in the water, and claimant therefore demands strict proof thereof, if the same is material.

8th. This claimant admits that on August 25th, 1903, a notice was served as set forth in the seventh article of the complaint.

And for a further answer to the said complaint claimant alleges that it denies each and every other allegation not hereinbefore specifically admitted to be true, and for a full and complete answer to the said complaint alleges:

9th. That on or about the 4th day of March, 1902, the Columbia Iron Works, a corporation organized and doing business under the laws of the State of Michigan, at St. Clair, Michigan, entered into a contract with Thomas J. Prindiville and John J. Boland for the construction and equipment of a steamer to engage in the general freighting business between ports and places on the Great Lakes and the waters connecting the same.

10th. That on or about the 5th day of April, 1902, John J. Boland and Thomas J. Prindiville, for a valuable consideration,

sold and assigned to this claimant all of their right, title and interest in and to the above named contract, and the said Iroquois Transportation Company thereupon assumed and agreed to perform all of the matters and things to be performed and kept by the said John J. Boland and Thomas J. Prindiville.

11th. That at the time of the making of the said contract and the assignment thereof the Columbia Iron Works were en-
7 gaged in conducting and operating a ship yard for the construction of steel ships at St. Clair, Michigan, and that during all the time the said steamer "Winnebago" was under construction under the terms of the said contract the said Columbia Iron Works had the reputation and was considered to be a corporation in good standing, with good credit, and apparently in every way able to carry out and perform its contracts and obligations

12th. That thereupon the Columbia Iron Works entered upon the construction of the said steamer, which was afterwards the "Winnebago," and this respondent from time to time made payments on account of the construction of said steamer, as required by the terms of the contract, as follows:

$7,500 at the time of signing the contract.
$7,500 on April 3rd, 1902.
$4,000 April 15th, 1902.
$4,000 June 15th, 1902.
$4,000 August 15th, 1902.

13th. That on or about the 25th day of September, A. D. 1902, it appearing that the said steamer would not be completed by October 1st, 1902, as agreed in the contract, in lieu of the notes to be given, as provided in the said contract, two notes for $4,000 each, payable to the said Columbia Iron Works, were executed and delivered, due in one and two years respectively, and a further payment of $8,000 was made in cash; that at the same time, in consideration of the delivery of the said notes, and the cash payment, it was understood and agreed that the steamer would be finished not later than April 1st, 1903.

14th. That the construction of the said steamer was continued and she was built and constructed to be of more than 1,000 tons burthen, and was intended to be used in navigating the Great Lakes and waters connecting and emptying into the same, and was not intended to be used to navigate the waters of the State of Michigan.

15th. That the said steamer was launched into the waters of the St. Clair River on or about the 21st day of March, 1903, and subsequently thereto was lying at the ship yard of the Columbia Iron Works, in the St. Clair River, at St. Clair, and was there fully finished, equipped and fitted out and made ready for sea, and on the — day of July, 1903, was duly enrolled and licensed as a steam vessel of the United States under the laws thereof, and on the 16th day of July, 1903, was, by the usual bill of sale, conveyed and possession thereof delivered to this respondent, and thereupon this respondent delivered to the Columbia Iron Works 96 bonds of the amount of $500 each and a mortgage upon the said steamer, secur-

ing the same, and also the remainder of the full purchase price, amounting in all to the sum of $95,000, as provided by the terms of the said contract.

8 16th. That at all times prior to July 18th, 1903, it was a well known fact among people engaged in ship building or trade and transportation business that said Columbia Iron Works were building and constructing the said steamer "Winnebago" for this respondent, and not for itself, and that these facts were well known to the complainant and the intervening complainant herein. And this complainant and intervening complainant were fully informed that the supplies to be furnished by them were furnished on the order of the Columbia Iron Works, contractor, and not on the order of this complainant or its agents or servants or the master or engineer of the said steamer "Winnebago," and that they were also informed that the said material and labor were to be furnished in the cosutruction of the said steamer and were not furnished on account of this claimant, the owner thereof.

17th. That from and after the launching of the said steamer this claimant employed a master and engineer to assist in finishing and fitting out the said steamer, and that from and after the launching of the said steamer both the said master and engineer were constantly on board of the said steamer, a fact well known to the complainant and its representatives. That on or about the 15th day of July, 1903, the master shipped and engaged an entire crew, who remained upon the said steamer and on board of her, in charge of the master, and they were, as the crew, engaged in navigating the said steamer from the port of St. Clair, Michigan, to the port of Loraine, Ohio, and thence to the port of Duluth, Minnesota.

18th. That the complainant has never furnished any material in or about the building, fitting out, furnishing or equipping of said steamer "Winnebago" at the instance or request of the owner, part owner, master, clerk, agent or steward thereof, and that if the complainant is entitled to any claim or lien against said steamer "Winnebago" by virtue of the provisions of the statute referred to in the complaint, the same must depend on and arise solely and entirely from the provisions of the proviso contained at the end of the first paragraph of section 2 of said Act, being paragraph 10,789 of the Compiled Laws of the State of Michigan for 1897; that said proviso purports to give a lien to persons dealing with the contractor only to the extent that the said contractor might be entitled to a lien at the time of notice to the owner of such claim or lien; that on July 18th, 1903, this respondent paid the Columbia Iron Works, the contractor, the entire balance due on its contract for the construction, equipment, etc., of said steamer "Winnebago," and at the same time this claimant had not received any notice whatsoever from complainant of any claim or lien upon its part against said steamer, and did not receive any such notice or have any knowledge of the fact that it had any unpaid account against said Columbia Iron Works until long after the making of said final payment on July 18th, 1903.

9 19th. That during all of the time that complainant furnished supplies, material and labor, as set forth in com-

plainant's petition, the said Columbia Iron Works were building and constructing a steel steamer known as the "Howard," which said steamer was launched soon after the "Winnebago," and during all of the time the said steamer "Winnebago" was being finished said steamer "Howard" was lying at the shipyards of the Columbia Iron Works at St. Clair, and was also being finished, equipped and fitted out by the said Columbia Iron Works.

20th. That the respondent had no knowledge as to whether or not complainant furnished the material mentioned in its complaint herein, or whether the same entered into the construction of the said steamer "Winnebago" or whether the same has or has not been paid for in full, and therefore leaves complainant to make such proof thereof as it may be advised is material.

And respondent further shows on information and belief that all of the material mentioned in the complaint herein that may have been ordered by the said Columbia Iron Works was ordered by the said Columbia Iron Works on its own account, and not for any particular boat or vessel; and that complainant extended all its credit to the Columbia Iron Works on its original orders, and did not furnish any material on the credit of the said steamer "Winnebago" or in reliance of any right or lien thereon.

21st. And this respondent further answering, shows that the said Chapter 298 of the Compiled Laws of 1897, in so far as it might, by its terms, be applied to respondent's steamer "Winnebago," is unconstitutional and void, being in violation of Sec. 8 of the First Articles of the Constitution of the United States as depriving this respondent of its property without due process of law and without proper protection, and also as being in violation of the 2nd Section of the 3rd Article of the Constitution of the United States conferring on the courts of the United States sole and exclusive jurisdiction in admiralty and maritime matters. And this respondent takes the same benefit thereof as if it had demurred to said complaint for the reasons herein set forth.

22nd. This respondent further alleges that at the time of the delivery of the said steamer, and on the 18th day of July, 1903, the same was not entirely finished, as it should have been, by the said Columbia Iron Works, and has since been finished at the expense of this claimant, and that in addition to the amount expended in the finishing of said steamer, the said Columbia Iron Works is indebted to this claimant for and on account of the damages suffered by this claimant, by reason of the failure of said Columbia Iron
10 Works to finish and deliver the said steamer to this claimant on the 1st day of April, 1903, as, under the terms of its contract with claimant, it was bound to do, and that the damage occasioned by the failure of the Columbia Iron Works to finish the said steamer and to deliver the same on April 1st, 1903, claimant has sustained damages in the sum of $10,000.

Wherefore, respondent prays that the complaint of the complainant herein may be dismissed with costs, and for such other and fur-

ther relief and redress in the premises as claimant is entitled to receive and the Court is competent to give.

IROQUOIS TRANSPORTATION CO.,
By THOMAS J. PRINDIVILLE, *Secretary.*

C. E. KREMER,
GRAY & GRAY,
Claimant's Attorneys.

STATE OF ILLINOIS, *County of Cook, ss:*

Thomas J. Prindiville, being first duly sworn, deposes and says that he is the Secretary of the claimant named in the foregoing answer; that he is authorized to subscribe to said answer in the name of the respondent, and that he has read the same and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters therein stated to be upon information and belief, as to those he believes it to be true.

THOMAS J. PRINDIVILLE.

Subscribed and sworn to before me this 27th day of October, A. D. 1903.

THEO. C. ROBINSON,
Notary Public.

11 *Opinion of Court.*

STATE OF MICHIGAN:

Circuit Court for the County of Wayne.

DE LANEY FORGE & IRON COMPANY, Complainant; GEORGE W. EDWARDS ET AL., Int'g Complainants,
vs.
THE STEAMER "WINNEBAGO."

Five questions arise in this proceeding, for materials furnished in or about the building of a vessel above five tons, used to navigate the waters of Michigan. The authorities conflict, and are strongly urged by able counsel.

The disputes are mainly on the law. The proceeding is brought under Section 10,789, Compiled Laws of Michigan, 1897. Sub-section 2 provides:

"Every water-craft of above five tons burthen, used or intended to be used in navigating the waters of this state, shall be subject to a lien thereon:

"First: For all debts contracted by the owner or part owner, master, clerk, agent or steward of such craft, on account of supplies and provisions furnished for the use of said water-craft; on account of work done, or services rendered, on board of such craft, by seamen, or any employé, other than the master thereof; on account of work done, or services rendered, by any person, in or about the loading

or unloading of said water-craft; on account of work done, or materials furnished, by mechanics, tradesmen, or others, in or about the building, repairing, fitting, furnishing or equipping of such craft," etc.

The language of the act has been construed in the Canfield case, 27 Michigan, 479, by Judge Cooley:

"The act is not confined to water-craft used or intended to be used exclusively in navigating the waters of this state, and the brig in question was in this particular strictly within the terms of the act, and if there is no admiralty jurisdiction, is within the reason for its enactment, notwithstanding a part of its voyage was upon the waters of another state."

The "Winnebago," in her claimed regular trade, proceeded on the usual courses of vessels, and concededly on her trips from Ohio ports to Superior, Wisconsin, was in Michigan waters a larger part of her run across Lake Superior, a large part of St. Mary's River, all of Lake Huron, part of St. Clair River, part or all of Lake St. Clair, and part of Detroit River. It is also proven that the ship visited the ports of Marquette and Lake Linden to unload or receive
12 cargo, after she went into commission that season.

The John Spry Lumber Co. *vs.* Steam Barge "C. H. Green," 76 Mich., 320. Sarmiento *vs.* The Catherine C., 110 Mich., 122.

II. The amount of the claim is not in serious dispute. The proof is strong from both sides that the materials claimed to have been furnished by complainant were actually furnished for use in or about the builders of the boat, then known as Hull No. 1, and subsequently called the "Winnebago," the forgings of complainant being made specially from blue-prints furnished by the builders of the ship. It is also clear that the larger part of the materials were furnished before the ship was launched, and all the materials claimed for were part of the ship's original construction. I find that the amount of materials claimed, to-wit, $1,999.90, were furnished for use in or about the building of the ship.

The spare tiller in the claim was furnished after the ship went into commission, but under a contract made previous to that time. This was a part of the ship's original construction, and the master of the ship testified that he took a temporary one from the yard until he could get his permanent one, which had been delayed in getting there. This is properly included in the bill against the ship, as part of her construction. In The Iosco, Brown's Admiralty, 495, Fed. Cas. 7060, a hull completed at the place of launching received a small cargo of flour as ballast, was towed with her spars on deck to another port, where her masts were stepped, and the vessel put in condition for navigation. It was held that the work was done in building the vessel, and that admiralty had no jurisdiction.

III. These proceedings have been held to be by due process of law, and the act on which they are brought to be constitutional, in Globe Iron Works *vs.* the John B. Ketchum, 2nd, 100 Mich., 583. Judge Grant says, at page 590:

"The water-craft law of Michigan, substantially in the present condition, so far as this question is concerned, has been upon the statute books since 1839. Act No. 43, Laws of 1839. Many cases arose under it prior to 1863, in none of which does the validity of the act appear to have been questioned."

See the same case on removal, in the United States Court of Appeals, in 97 Fed., page 872.

In so far as the act relates to contracts in connection with the building of a ship, it is constitutional.

In Knapp, etc., *vs.* McCaffrey, 177 U. S., page 638, at page 640, Mr. Justice Brown reviews the authorities, and says:

13 "The rule to be deduced from these cases, so far as they are pertinent to the one under consideration, is this: That wherever any lien is given by a state statute for a cause of action cognizable in admiralty, either *in rem* or *in personam*, proceedings *in rem* to enforce such lien are within the exclusive jurisdiction of the admiralty.

"But the converse of this proposition is equally true, that if a lien upon a vessel be created for a claim over which a court of admiralty has no jurisdiction in any form, such lien may be enforced in the courts of the state. Thus, as the admiralty jurisdiction does not extend to a contract for building a vessel, or to work done or materials furnished in its construction, we held, in Edwards *vs.* Elliott, 21 Wallace, 532, that in respect to such contracts it was competent for the states to enact such laws as their legislatures might deem just and expedient, and to provide for their enforcement *in rem*."

IV. The credit was given by the complainant to this vessel, and the furnisher (Robbins swears) contracted and carried the items as for ship No. 1, afterwards named the "Winnebago," and knew they were to be used in the construction of the "Winnebago."

V. When the "Winnebago" was enrolled, she was enrolled in the name of the Columbia Iron Works as owner. The materials here were furnished to the Columbia Iron Works, and whether the Columbia Iron Works be treated as actual owner, in accord with the testimony and in accord with the construction under a case involving similar facts, to-wit, Globe Iron Works *vs.* The Ketchum, 97 Fed., 872-876-879-880, or whether the Columbia Iron Works be considered the agent of the owner, within the meaning of the statute, as in the case of Sarmiento *vs.* The Catherine C., 110 Mich., pages 120–125, still the lien attaches, and without argument on a line of later cases with altered facts, the rules in the cases cited seem to control in this case, and are adopted.

To summarize the question:

I find (1): The issue is not on the sum due in this case, or the goods furnished, but as to whether the vessel is liable; and whether a note of $5,000, not paid but held, the failure following about 30 days later, was accepted by the complainant in payment of the materials furnished, or whether the vessel is held under the lien law provided by statute. In my view, the note is not a payment.

I find (2): It is a luxury to hear a case so carefully and clearly presented on both sides.

Conflicting authorities were given at great length. But it appears from the reasoning of the Sarmiento case, 110 Michigan, and the J. B. Ketchum, 100 Michigan, that the materials furnished and the work done in the completion of this vessel fall directly within the lien law. The reasoning of Judge Brown in the Prentiss case, 36 Federal is convincing on that point, that where the supplies or the material is furnished in the manner given in this case, there is a credit extended to the vessel itself.

14 I find (3): That parties have a right to rely upon the property itself that received this benefit, and, from the identification furnished by the blue-print work, and the correspondence, and the character of material furnished, and everything done, I find that the materials were furnished for this ship, and that complainant so understood it, and that complainant is entitled to a lien. This seems to be the intent and meaning of the statute, and, from the testimony of the Messrs. Robbins, the De Laney Forge and Iron Company furnished the materials in or about the building of the ship within the meaning of the statute, and I find that the work was put into the boat. There can be no mistake that the benefit was actually furnished and appropriated to the use and make-up of the steamer.

I find (4): The next proposition is whether the sixty-day note applies to the credit, and was payment and extinguishment of the lien. Under the peculiar circumstances of this case, I do not so find. The note was accepted as notes generally are in payment, but presumably that it would be paid, and if paid to be a payment, but if it had turned out to be, as it did, worthless, this note was no payment.

I find (5): I think that the case falls clearly within the Prentiss case, 36 Federal Reporter, where it was held that where material is sent to the vessel, to be used in or about the building of the vessel, the vessel is subject to a lien. The Iroquois Transportation Company contracted with the Columbia Iron Works, and took this vessel before it was fully completed. Under the lien law, I think they took it subject to whatever claims were against it. And while it is unwise to review the many cases cited by defendant, touching a buyer in good faith, in a case of this nature, still the equities point strongly to a lien on the ship. The weight of authorities in such matters, as more recently construed by Justices Brown and Lurton, leads to this conclusion, and also to the conclusion that this vessel was within the jurisdiction, within the waters where a lien would attach. And, taking the cases together, with the more recent citations from the Federal authorities, I am convinced without further reasons that a lien attaches in this case for the full amount of the material furnished, the amount being $1,999.90, and interest from August 1st, 1903, for which the complainant's claim is allowed.

J. W. DONOVAN,
Circuit Judge.

Detroit, May —, 1904.

15 *Judgment.*

At a session of the Circuit Court for the County of Wayne convened and held at the Circuit Court Rooms in the City of Detroit, on the 1st day of June, A. D. 1904.

Present: Hon. J. W. Donovan, Circuit Judge.

No. 63, B. & V.

DE LANEY FORGE & IRON COMPANY, Complainant,
vs.
THE STEAMER "WINNEBAGO."

This cause having been brought to trial before the Court without a jury, and the Court, after hearing the proofs and allegations of the parties and the arguments of counsel, having found that the said complainant is entitled to recover in manner and form as the said complainant has, in its bill of complaint in this cause, set forth, and that the said complainant is entitled to recover, on occasion of the premises, over and above its costs and charges by it about its suit in that behalf expended, the sum of One Thousand Nine Hundred Ninety-nine and 90-100 (1,999.90) Dollars, with interest thereon from August 1st, 1903;

And it appearing that the Steamer "Winnebago," proceeded against herein, has been released upon bond filed by the Iroquois Transportation Company, as claimant and owner of said vessel, with the United States Fidelity & Guaranty Company, of Baltimore, Maryland, as surety, wherein and whereby said claimant and said surety subject themselves to the jurisdiction of this Court in this behalf,

Now, Therefore, it is Considered and Adjudged that the said complainant do recover against the said claimant herein, the Iroquois Transportation Company, and the United States Fidelity & Guaranty Company of Baltimore, Maryland, its said surety, its damages aforesaid, together with its costs and charges aforesaid, to be taxed; and that the said complainant have execution therefor.

16 STATE OF MICHIGAN:

The Circuit Court for the County of Wayne.

No. 63, B. & V.

DE LANEY FORGE & IRON COMPANY, Complainant,
vs.
STEAMER "WINNEBAGO."

Claim of Appeal.

Now come the Iroquois Transportation Company and the United States Fidelity and Guaranty Company, of Baltimore, Maryland,

against whom the judgment in the above entitled cause was rendered, and who are the parties defending against said judgment, and, thinking themselves aggrieved thereby, do hereby, in accordance with the statute in such case made and provided, by Gray & Gray, their attorneys, claim an appeal from said judgment to the Supreme Court of the State of Michigan.

Detroit, June 9th, 1904.

(S'g'd) IROQUOIS TRANSPORTATION CO.,
By GRAY & GRAY, *Its Attorneys.*
UNITED STATES FIDELITY & GUARANTY CO.,
By GRAY & GRAY, *Its Attorneys.*

STATE OF MICHIGAN:

The Circuit Court for the County of Wayne.

No. 63, B. & V.

DE LANEY FORGE & IRON COMPANY, Complainant,
vs.
STEAMER "WINNEBAGO."

Bond on Appeal.

Know all men by these presents that the Iroquois Transportation Company, a corporation organized and existing under the laws of the State of Indiana, and the United States Fidelity & Guaranty Company, of Baltimore, Maryland, a corporation, and Thomas J. Prindiville, as surety, are held and firmly bound unto the De Laney Forge & Iron Company, a New York corporation, in the sum of four thousand ($4,000) dollars, lawful money of the United States of America, to be paid to the said De Laney Forge & Iron Company, or to its certain attorneys, successors or assigns, to which payment well and truly to be made they, and each of them, bind themselves, and their heirs, executors, administrators and successors, and each and every of them, firmly by these presents.

17

Sealed with their seals and dated the 9th day of June, 1904.

The condition of this obligation is such that, whereas, in a certain suit recently prosecuted in the Circuit Court of the County of Wayne and State of Michigan, by the said De Laney Forge & Iron Company against the steamer "Winnebago," wherein the above bounden Iroquois Transportation Company is claimant, and said United States Fidelity & Guaranty Company, of Baltimore, Maryland, is surety upon the bond given for the release of said steamer from custody and final judgment, was rendered by said Circuit Court on the first day of June, 1904, in favor of said De Laney Forge & Iron Company against said Iroquois Transportation Company and the United States Fidelity & Guaranty Company, of Baltimore, Maryland, for the sum of one thousand nine hundred and ninety-nine and 90-100 ($1,-

999.90) dollars, with interest thereon from August 1, 1903, and costs to be taxed, and an appeal to the Supreme Court of the State of Michigan has been taken from said judgment by the above bounden Iroquois Transportation Comapny and the United States Fidelity & Guaranty Company, of Baltimore, Maryland,

Now, therefore, if the said Iroquois Transportation Company and the United States Fidelity & Guaranty Company, of Baltimore, Maryland, shall and do well and truly and perfectly abide such order as may be made by the Supreme Court of the State of Michigan in said suit in the matter of said appeal, then this obligation shall be void, otherwise to remain in full force and virtue; and a further consideration of this obligation is that judgment may be entered against all of the parties hereto in accordance with such order as the Supreme Court May make and enter on said appeal.

IROQUOIS TRANSPORTATION CO.,
[SEAL.] By C. E. KREMER, *Pres't.*
THOMAS J. PRINDIVILLE.

Attest:

THOMAS J. PRINDIVILLE, *Secretary.*

THE UNITED STATES FIDELITY & GUARANTY COMPANY.
[SEAL.] GEORGE I. WEBB, *Attorney in fact.*

18 STATE OF ILLINOIS, *County of Cook, ss:*

C. E. Kremer, of Chicago, being duly sworn, deposes and says that he is president of the Iroquois Transportation Company, an Indiana corporation; that said corporation is the owner of the steamer "Winnebago" and is the claimant against whom the judgment referred to in the foregoing bond has been rendered; that he has signed the foregoing bond on appeal in said case on its behalf, being duly authorized so to do.

C. E. KREMER.

Subscribed and sworn to before me this 9th day of June, A. D. 1904.

CHARLES W. GREENFIELD,
Notary Public, Cook County, Illinois.

My commission expires May 7th, 1907.

STATE OF ILLINOIS, *County of Cook, ss:*

George D. Webb, of Chicago, Illinois, being duly sworn, deposes and says that he is attorney in fact of the United States Fidelity & Guaranty Company, of Baltimore, Maryland; that said corporation is the surety against whom judgment was rendered as such as set forth in the foregoing bond, and that he has signed the foregoing bond on appeal on its behalf, being duly authorized so to do.

GEORGE D. WEBB.

Subscribed and sworn to before me this 9th day of June, A. D. 1904.

LEW H. WEBB,
Notary Public, Cook Co., Ill.

My commission expires April 24, 1905.

I, William McGregor, clerk of the Circuit Court for the County of Wayne and State of Michigan, do hereby approved the surety on the within bond of appeal of the Iroquois Transportation Company, and the United States Fidelity & Guaranty Company, of Baltimore, as to its responsibility.

WM. H. McGREGOR, *County Clerk,*
By C. H. AUSTIN, *Deputy.*

19 *Stipulation.*

STATE OF MICHIGAN:

The Circuit Court for the County of Wayne.

No. 63. B. & V.

DELANEY FORGE & IRON COMPANY
vs.
STEAMER "WINNEBAGO."

In order to do away with the necessity of taking testimony *de novo* on an appeal in the above entitled cause it is hereby stipulated that the testimony taken upon the trial of said cause in the Circuit Court for the County of Wayne may be returned to the Supreme Court and treated as original depositions taken in said cause, and the case heard in the Supreme Court upon said testimony and such additional testimony as the parties may desire to take under the statute in such case made and provided.

SHAW, WARREN, CADY & OAKES,
Attorneys for Complainant and Appellee.

GRAY & GRAY,
Attorneys for the Iroquois Trans. Co., Claimants of said Steamer, and U. S. Fidelity & Guaranty Co., Baltimore, Md., Surety on the Bond of Claimant.

Stipulation.

STATE OF MICHIGAN:

The Circuit Court for the County of Wayne.

DELANEY FORGE & IRON COMPANY
vs.
STEAMER "WINNEBAGO."

It is hereby stipulated that the annexed is a copy of the testimony taken on the trial of the said cause in the Circuit Court for the County of Wayne, together with the exhibits referred to therein.

SHAW, WARREN, CADY & OAKES,
Attorneys for Complainant and Appellee.

GRAY & GRAY,
Attorneys for Claimant.

20 *Testimony.*

DELANEY FORGE & IRON COMPANY
vs.
STEAMER "WINNEBAGO."

Messrs. Shaw, Warran, Cady & Oakes, attorneys for complainant.
Messrs. Krèmer and Gray, attorneys for defendant.
Donovan, J.

MAY 11TH, 1904.

WILLIAM ROBBINS, sworn for plaintiff.

Examined by Mr. OAKES:

Q. Where do you reside?
A. In Buffalo, New York.
Q. What is your connection with the plaintiff in this case?
A. I am the secretary of the Delaney Forge & Iron Co.
Q. What is the business of that company?
A. The manufacture of iron and steel forgings, entering into the construction of ships, etc.
Q. Have you heard of the Columbia Iron Works?
A. I have.
Q. Just state to the Court what, if any, dealings you had with them in the summer or fall of 1902?
A. We furnished the Columbia Iron Works with all the forgings upon the hull and engine—the forgings required in the construction of the steamship Winnebago and other vessels.
Q. What were the terms under which those forgings were furnished?
A. The general terms of sale for which we sold our forgings in the matter of ship forgings, 30 days net from date of invoice.

Q. State to the Court what these forgings were furnished for, if you knew; whether in each instance you knew where those particular forgings were going?

A. Why, we do.

Q. How about this particular case?

A. Why, we understand that the rubber and the stern frame and the stem irons forming a complete equipment, and the hull forgings, and all there is entering into the construction of the engine, such as plunger rod, crank-pins, piston rod and all the articles named in that list.

21 Q. I show you a schedule attached to the bill of complaint filed in this case and ask you whether you knew that the items there enumerated, all of them, being furnished to the Columbia Iron Works?

A. I recognize each and every one of them as a complete bill of forgings.

Q. They were furnished by you for what?

A. For this steamship Winnebago, known to us in the beginning as Hull No. 1 and engine No. 1.

Q. Do you know of your own knowledge of their being furnished?

A. Yes, sir.

Q. And shipped?

A. I do.

Q. I presume you were not present at the office or the yards of the Columbia Iron Works during the construction of that ship, you personally?

A. No, sir. My younger brother was occasionally called to St. Clair.

Q. Did you at any time after the furnishing of this material visit the yards of the Columbia Iron Works?

A. Yes, sir.

Q. Captain, I show you a package of 28 letters fastened together. I wish you would just look at them and state what they are without going into detail?

A. I simply say upon receipt of blue prints of the forgings required for various vessels.

Q. State what these are?

A. Original orders and correspondence that passed between the Columbia Iron Works and ourselves during the time we were manufacturing forgings for the vessel in question.

Q. The papers I hand you being only the letters from the Columbia Iron Works to you?

A. That is all.

22 Marked Exhibit "1," a package consisting of 28 letters, attached together.

Paper marked Exhibit "2."

Q. I show you a blue print marked plaintiff's Exhibit "2." I wish you would just state what that is; what it is a blue print of?

A. A tiller for the quadrant of steamship No. 1.

Q. Where did you get that blue print?

A. From the Columbia Iron Works, St. Clair, Mich.
Q. A part of the plan of their ship?
A. Yes, sir.
Q. Furnished by them to you?
A. Yes, sir.
Q. State whether or not you completed the tiller in accordance with this plan?
A. Yes, sir, we built that.
Q. And that would be the item enumerated in that list?
A. Yes, sir.
Q. In the bill of complaint?
A. Yes, sir.
Q. The schedule attached?
A. Yes, sir.

Paper marked Exhibit "3."
We wish to formally offer Exhibit "2" in evidence.

Q. I show you a blue print marked Exhibit "3" and I wish you would state what it is?
A. That is the spare tiller for the same boat.
Q. State whether there is anything on that identifying it as steamer No. 1?
A. Yes, sir, "S. No. 1," meaning Steamer Number One.
Q. Marked where?
A. By the Columbia Iron Works in their drafting department.
Q. State whether or not the article was furnished in accordance with that specification?
A. Yes, sir.
Q. That is enumerated in the schedule attached to the bill of complaint?
A. Yes, sir.

We wish to offer this Exhibit "3" in evidence.
Paper marked Exhibit "4."

Q. I show you a blue print marked Exhibit "4." If you will state what that is?
A. Those are the front columns entering into the construction of the engine for the steamer Winnebago.
Q. Those were received the same as the other from the Columbia Iron Works?
A. The same way.
Q. State whether or not the articles were furnished in accordance with the specifications?
A. Yes, sir, they were furnished by us.
Q. In accordance with the specifications?
A. Yes, sir.
Q. Appearing in the schedule attached to the bill of complaint?
A. Yes, sir.

23 I wish to offer Exhibit "4" in evidence.

Q. These are all the original plans, I take it. There are no objections to offering these in evidence?

Mr. KREMER: Not if they refer to No. 1.

Q. I show you Exhibit "5." You may state what it is?

A. That is the rudder frame for the same boat.

Q. The plans furnished by the Columbia Iron Works to you?

A. Yes, sir, marked Steamer No. 1.

Q. The article furnished in accordance with the specifications?

A. It was.

Q. And on the bill of complaint?

A. Yes, sir.

Q. And scheduled in the bill of complaint?

A. Yes, sir.

Q. I show you Exhibit "6." You may state what it is?

A. Those are the valve stems; that print is marked there Steamer No. 1, Engine No. 1, furnished by us.

Q. And the article appears in the list attached to the bill of complaint?

A. Yes, sir.

Q. And was furnished in accordance with the specifications?

A. It was.

Paper marked Exhibit "7."

Q. I show you Exhibit "7." You may state what that is?

A. Those are the connecting rods and the connecting rod caps for engine No. 1, all of which were furnished by us in accordance with the specifications.

Q. Plans from the Columbia Iron Works, the same as the others?

A. Yes, sir.

Paper marked Exhibit "8."

Q. I show you Exhibit "8," blue print. State what appears there?

A. That is a blue print showing the crank webs, the crank pins, the short-collared section, the crank shaft, together with the short plane section of crank shaft, all of which were furnished by us to the Columbia Iron Works, in accordance with the specifications, by us.

Q. For what boat?

A. For engine No. 1, steamer No. 1.

I wish to offer Exhibits "5," "6," "7" and "8" in evidence.

Q. I show you the schedule attached to the bill of complaint and ask if you are familiar with the prices stated there?

A. Yes, sir.

24 Q. What can you say as to the correctness of the prices marked there?

A. The items for each are correct in this—in this list, Mr. Oakes, telling exactly what credits were given by the bookkeepers of the Columbia Iron Works, the account, was all right; tallied exactly through with ours.

Q. On July 6th last, what was the balance due on this account for goods furnished to the Winnebago?

A. On July 16th, Mr. Oakes, that was the termination of the

contract. We had filled their orders at that time. The amount due was $1,999.90.

Q. That is with reference to the Winnebago?

A. Yes, sir.

Q. You may state whether or not, at the time you received any payment from the Columbia Iron Works for goods furnished, materials furnished?

A. Do you mean by that, received any remittances from them?

Q. Yes, sir.

A. On one occasion they paid for the stern frame of that boat.

Q. Is it shown on this list?

A. No, sir.

Q. Whether or not you at any time received anything in the way of notes or bills payable from them?

A. We received one note. I forget the date. We had a note from them for the sum of $5,000 to apply on their account.

Q. State whether or not that was received by you in any way waiving your lien or other security?

A. No, sir, accepted in the ordinary course of business.

Mr. KREMER: I object to that as immaterial, irrelevant and leading.

COURT: If there is anything about the leading character, better correct that. You are entitled to the testimony; this is in the nature of a chancery inquiry, but be careful about leading. If necessary, strike it out and start over again.

Q. What, if any, conversation or agreement was had between you when this note was sent by them to you?

A. There was no agreement. It was accepted in the ordinary course of business. We accepted the note, of course, at the same time waiving no right under the lien law on the vessel.

Objected to as irresponsive.

COURT: There is one other question that may come out, but I will keep still until you get through cross-examination.

Q. State whether or not that note was ever paid?

A. No, sir, it was not.

COURT: I was going to ask that.

Q. State whether it has been tendered back to the Columbia Iron Works?

A. Yes, sir, for payment.

Q. These memoranda marked "Credits" on the schedule attached to the bill of complaint are what?

25 A. In selling, or at the time of making some of these to the Columbia Iron Works it was agreed by us that we would allow them the freight at Port Huron, at St. Clair; in other words, sell f. o. b. cars, St. Clair, Mich., and the items of credit simply cover the freight charges on the different consignments.

Q. At the time this note was sent on by the Columbia Iron Works to you, you may state to the Court what the account owing to your company at that time was, approximately?

A. The note at that time, or received at that time, from the Columbia Iron Works people was for the sum of $5,000, and, to the best of my recollection, the amount at that same period was about $9,000; the note was $5,000 to apply on that account.

Q. I show you their letter from the last of this Exhibit "1." I will have you identify that?

A. I identify it all right, June 23.

Q. As received from the Columbia Iron Works?

A. Yes, sir.

Letter dated Port Huron, Mich., June 23, 1903.

Delaney Forge & Iron Co., Buffalo, N. Y.

GENTLEMEN: Your favor of June 18th. We are enclosing you our 60-day note for $5,000, with interest at 6 per cent. We trust this amount will help you out. The balance of the account we will endeavor to take care of within the period.

COLUMBIA IRON WORKS,
By C. O. DUNCAN, *Treasurer.*

Q. At the time of furnishing these materials for the construction of the Winnebago I do not know as it appears fully in the record—state on whom you relied or on what you relied for your credit?

26 Mr. KREMER: I object to that as a conclusion of law from the witness.

COURT: Did you have any special terms, due in so many days, at the expiration of the furnishing, or what was said? If nothing was said, we will leave it.

Q. Whether or not there was any special terms?

A. There was not; outside of the general terms of sale as stated before, 30 days net from the date of invoice. I might say to your Honor, to the Court——

Mr. KREMER: Wait a moment. I would rather you would answer the question so that I can get an objection.

A. I might say to your Honor——

Mr. KREMER: I would rather you would put it in the form of a question.

Q. I wish you would explain fully the conditions under which these materials were furnished, the terms of credit and the purpose in furnishing, and your intention in furnishing them?

Mr. KREMER: I object to that. If there was any agreement, that is the best evidence; and if there was not any agreement, the facts as to what occurred is better evidence than any intention which people carry around in their bosoms.

COURT: That is correct in its principle, but I think we will reach it, however; his personal intention, his secret intention, they might not know all, but the acts and dealings of the parties who made their interpretation in the absence of the contract, together with the statute on the subject of liens.

Q. Mr. Robbins, in making your dealings for furnishing these forgings, was there at any time any talk with reference to—any express agreement with reference to a lien?

A. No, there was not; but we never waived our rights to any lien.

27 Q. When these materials were furnished, Mr. Robbins, did you know of any statute of Michigan giving a right to a lien?

Objected to. Everybody is supposed to know the law.

COURT: I do not think he has got to know them; he has a right to avail himself of all his legal rights.

Mr. CADY: The fact that this man had had extensive dealings in Michigan and been through the so-called Wheeler affair, and was thoroughly acquainted with his technical rights can be shown.

COURT: I am obliged, under the case in the 77 Mich.—that is, the Buhl and Alger case—the Court is obliged to take notice of the law and interpret the law, unless it is an immoral contract or something prohibited; he is obliged to take notice of it and interpret it according to the just rights of the parties, so that he could not swear to the statute; it is statutory law.

Q. To whom did you give credit in furnishing these materials?

Mr. KREMER: I object to that. The facts and circumstances——

COURT: To whom did you charge them?

Mr. KREMER: The books will show.

COURT: To whom did you charge it?

Mr. OAKES: I think where they are carrying along an account, and furnishing different materials, I think the witness would have a right, and should be allowed to *to* say to what he credited them.

COURT: I think the Gearing case covers it in this case. I haven't it here, but it was affirmed, and three of the best lawyers in the city took it up, but the meaning was this: the man furnishing the material has a right to look to the builder. They say, here is a structure; something going up; he has a right somewhere in this case.

28 Mr. CADY: That is this case exactly; to show this job got it.

COURT: He would have a right to that, just like furnishing goods; what he could see there like when he came there.

A. Of course all I did ascertain——

COURT: Did you know about the ship being built?

Q. Did you ever know of the ship actually being built?

A. I did.

Q. Mr. Robbins, did you visit the yard where this ship was built in July or August last year?

COURT: Or some time?

A. I did.

Q. Did you take occasion at that time to see what, if any, forgings were in the yards of that concern at that time—forgings of the character manufactured by your company?

Objected to, because it is immaterial; it is immaterial what other forgings were there.

Q. What, if anything, do you know about the use of this, about their appropriating this property, and putting it into the boat, do you know it?

Mr. OAKES: The letters show the receipt of the things.

Mr. KREMER: If Mr. Robbins was not there, he would not know.

COURT: Except by the letters.

Mr. KREMER: There is other evidence upon that point.

COURT: You may show that they went into it; that is also covered by the Gearing case, where 200 barrels of cement remained at Brady building, and did not go up upon the ground and they were not considered a part of the property, and certain stone cut for the building did not go in, but was upon the ground, and
29 they were considered in the property; that is well defined in the Gearing case; that is the distinction.

Q. I do not know whether this particular question has been excluded; on what did you rely for your credit when these materials were furnished?

Objected to.

COURT: I think the objection has to be taken, but under the Chancery practice we have to make the inquiries on the subject.

Mr. GRAY: This is not strictly a Chancery case. It is on the law side of the Court, and under a special statute, and the Court has held, on an appeal, that Chancery practice is not strictly applicable to this class of cases.

COURT: In the Moody-Fairburn case, however, they have held that the Court, when they bring the case into court, must do it within the statute, and under the statute be orderly; but when in court, the enforcement—then it has a remedial tendency, and the range is broader, if they find they have taken their steps in time, and they are once in court, then the inquiry is quite wide; that is the distinction in the Fairburn-Moody case.

Mr. KREMER: That is the mortgage lien law; it might be different from the watercraft statute; it is neither fish, fowl or good, red herring, but analogous to both.

COURT: Upon that subject you are not in here. What did I hear from Judge Frazer, about a jury being called in this case? Were you intending to have a jury?

Mr. GRAY: The plaintiff thought they had made a sufficient showing for a jury trial, and the statute provides the trial shall be by the court unless the jury should be demanded.

COURT: Let us settle it now; I hardly think in a case of this kind an advisory jury—I hardly think you would be satisfied with
30 it; it gives them a wide range, like their play in the Richardson case; I think the range would be so wide it would not be helpful. What do you say?

Mr. KREMER: We do not want a jury.

COURT: What do you say, Mr. Cady?

Mr. CADY: We do not care for a jury.

COURT: Well, that is the way.

Question repeated.

Objected to as immaterial and calling for the witness' conclusion.

A. On the liens we held against the vessel, under the watercraft act in this State?

Mr. OAKES: As we have another witness we want to get through with tonight, I will read these letters tomorrow.

Cross-examination.

By Mr. KREMER:

Q. Where were these different articles manufactured?
A. In the City of Buffalo.
Q. The State of New York?
A. Yes, sir.
Q. They were shipped by rail to St. Clair?
A. Yes, sir.
Q. When did you first see ship No. 1, or any part of her, except what you were manufacturing?
A. I cannot name the exact date, but I had occasion to pass through St. Clair and Port Huron numerous times during the course of construction, and I saw her a number of times.

Mr. CADY: Is there any question that ship No. 1 and the Winnebago are not the same identical one?
COURT: It has been sworn to.
Mr. KREMER: It is conceded they are the same.

Q. From your personal knowledge, you did not see this
31 material made apart of No. 1, or the Winnebago, of your own personal knowledge?
A. I did.
Q. What did you see of your material in the Winnebago?
A. I saw her stern frame, her rudder and her stem.
Q. When?
A. During the course of her construction.
Q. When?
A. At the time she was at the yards, and also identified her in Buffalo the other day.
Q. In what month did you see that stuff in her?
A. I cannot say the exact day or date.
Q. Had she been launched at that time?
A. Her hull was in the water.
Q. You say she had a stem and stern frame?
A. And rudder frame.
Q. You stood and took a look at her?
A. Yes, sir; I did.
Q. In the water?
A. Yes, sir.
Q. Can you testify positively she had these in her?
A. Yes, sir.
Q. Was that the first time you saw the material in her to recognize it?
A. I cannot say.

Q. How did you originate this contract; by correspondence, or the order given to you by letter?

A. On the strength of an inquiry from the Columbia Iron Works, asking us to make certain forgings—these sort of forgings which entered into the construction of the steamer Winnebago; my younger brother, who acts as salesman for our company, personally solicited the order and came on to Port Huron and secured the business.

32 Q. And after that the business matters were carried on entirely by correspondence?

A. Yes, sir.

Q. Did you keep books of this account?

A. Yes, sir.

Q. What did you charge the material to?

Objected to as immaterial.

COURT: I think that is a fair inquiry, because you opened the door by asking him to whom he gave credit; therefore, it makes an honest inquiry; he raised that question.

Mr. OAKES: There is no question but what he dealt with the Columbia Iron Company.

COURT: You may take an answer; note an exception.

Question repeated.

A. We billed the material to the Columbia Iron Works, St. Clair, Mich.

Q. Now, the account in your books, which shows the items contained in the bill of particulars, and attached to your bill of complaint here, appear in these books as against the Columbia Iron Works?

A. As against steamer No. 1, and engine No. 1, as the goods were shipped.

Q. And you, at the same time, or about that time, were also building other parts for other steamers for the Columbia Iron Works?

A. Yes, sir.

Q. Do you know how they were designated?

A. The blue prints and specifications designated them.

Q. In what manner?

A. Engine No. 3, engine No. 4, and engine No. 5.

Q. You furnished forgings for all of this number of ships?

A. Yes, sir.

33 Q. In the same manner as you were furnishing forgings for No. 1?

A. Yes, sir.

Q. And shipped them in the same manner?

A. Yes, sir.

Q. Then I understand you billed to the Columbia Iron Works as well?

A. Yes, sir; for engine No. 3, and engine No. 4, and engine No. 5.

Q. You labeled the parts?

A. Yes, sir; and made notes of it on the invoices usually.

Q. Showing what part they referred to?
A. Yes, sir.
Q. Did you know at that time who they were building the ship for, No. 1?
Mr. OAKES: At what time?
Q. At any time?

Objected to as immaterial.

Q. At the time you were making them, did you know who the ship was being built for?

COURT: That is a fair question.
Mr. OAKES: I should think he should state when.

Q. At any time you were furnishing the material?
A. We did not look at it in that way.

Mr. KREMER: It is not a question of eyesight.
Mr. CADY: I do not see how it can be material.
COURT: He has answered in your favor.

Q. Did you at any time while furnishing these goods hear that it was being built for Mr. Prindiville and Boland, of Buffalo?

Objected to as immaterial.

A. That was immaterial to us.
Q. Did you know?
34 A. I did not.
Q. Did you at any time hear, while you were furnishing any of these materials to No. 1, that that vessel was being built for Mr. Prindiville, or Mr. Boland, of Buffalo?

Objected to as immaterial.
Note an exception.

Question repeated.

A. I cannot say.
Q. And then you do not remember now whether you heard that or not?
A. It was immaterial, whether I did or not.
COURT: If you do not remember——
Q. You do not remember, you mean now; you may have been told that the boat was being built for Mr. Prindiville, or Mr. Boland, or either of these gentlemen?

Mr. CADY: I object to that as -material.

A. I do not know.
Q. You do not know?
A. No, sir.
Q. You have just stated that you do not recollect whether you can or not?
A. Yes, sir.
Q. Now, if you were not told that, how did you find it out?

Mr. OAKES: Objected to. He has not said that he found it out.

COURT: No; he has not made it clear to me that he found it out, and certainly not during the time building.

Q. If you did not hear it, how did you find it out, if you found it out?

A. When we came to look for our payments for the forgings furnished for that vessel we found it out.

35 Q. And when did you commence to look for payment for these forgings; when was that?

A. When the accounts became due.

Q. When was that; what month was that?

Mr. CADY: The witness has a right to examine his accounts.

A. It was about the time we asked these people to furnish this note for $5,000, as shown by your letters, just prior; their letter shows that.

Q. I find your account, as attached to the complaint, begins with November 24th, 1902, and items were furnished during that month; during December, January, February, April and July.

A. Yes, sir.

Q. That is right?

A. Yes, sir.

Q. You say that the first time that you knew that this boat was being built for Mr. Prindiville or Boland, was just about the time, just before the time you received that note of $5,000 was it; if not, tell me what time it was?

All subject to the same objection as immaterial.

Note an exception.

COURT: Go on; take an answer.

A. As I stated before, I do not remember the particular month, day or date.

Q. Well, do you remember whether before or after the date of the note?

A. I can say it was prior to the receipt of the note; I can answer that.

Q. The note was dated June 23rd; how long it was—you think it was just prior to that time?

A. Yes, sir.

Q. Tell us what you heard, and how you heard of it, and how you found it out?

36 All subject to the same objection. I do not want to interrupt every time.

COURT: Unless he heard it from one of the parties, it would be regular rumor, and hearsay; I think we ought to confine it to one of the parties defendant, or one of their firm; I do not think he should be compelled to take notice of a rumor.

A. My younger brother, he was negotiating the sale of forgings from other vessels.

Objected to, if it is hearsay.

COURT: Is your younger brother here?

A. Yes, sir.

COURT: That would be better evidence. You could not give what was said; but if he brought it home to you?

A. Your Honor, he acted as salesman for the company.

Q. Now, what was the information that you got?

Mr. OAKES: Subject to the same objection; what he said is immaterial.

Note an exception.

COURT: He will be on the stand himself.

A. Do you want his wording?

Q. The substance of it.

A. Do you want what he said to me?

Q. In substance.

A. Upon his return home, he reported to the officers of the company, of which I am one, that hull No. 1 had been completed, and was in the water, and that she had been christened, and called the Winnebago.

Q. I want to know what you knew about the boat being built?

Mr. OAKES: I still object to the hearsay evidence.

COURT: He stated how it happened to be named. Anything else?

37 Q. I want to know from whom you found out it was being built for Mr. Prindiville, or Mr. Boland?

Objected to; he has not stated that he found out it was being built for these people; it does not appear he had heard about it; I object to it as hearsay.

COURT: Did you afterwards find out it was being built for the firm in Buffalo?

A. Why, the marine reports that are published daily give every manufacturer that information.

Q. Now, what was the information that you got?

A. That the boat had been completed, etc.; I read a thousand of these notices; but the Winnebago had left the Columbia Iron Works, at St. Clair and so on.

Q. I ask you what you heard about her being built for or by Prindiville, or either one, or the Iroquois Transportation Company; what you heard upon that subject?

Objected to; he has not testified that he heard upon that subject; he said that he heard who she was being built for, but did not for either one of these parties.

Q. I ask him what he heard?

Mr. CADY: It seems Mr. Kremer has gone into that; he said he did not hear, did not know, did not remember; that he had no information upon that subject.

COURT: That is my recollection; I would like to get the note in some other way.

Mr. KREMER: He said that just before the note, that he heard that the things was being built for someone else. I ask him now

what he heard; whether a partnership, or company, or who it was?

COURT: He may answer if he knows.

Q. Do you?

Note an exception.

A. All the information I got was from my brother on his return from St. Clair.

38 Mr. OAKES: It can make no difference about the question of ownership while building, when she was built, or, up to this date, if he has complied with the statute; it does not make any difference what rumor he heard.

COURT: I should certainly say it does not make any difference what he heard, after he furnished the material; but it would have no bearing upon the contract after the work was done, so you may take that and take an exception.

Mr. OAKES: I take an exception. It does have a bearing upon the work there was done afterwards.

COURT: Any material furnished, and it might have a bearing, but the main job, the construction, what he put into it, up to the time, would not have a bearing.

Q. Let me start over again. What did you mean when you said about the time your account came due, about the time, or just about the time you got the note, you heard something in connection with the ownership of this boat?

A. I did not say that.

Q. What did you mean by that?

A. I did not say that.

Q. What did you say?

A. I have not replied to that question yet.

Q. Then we are all wrong; we will begin over again. Now, I will ask you now that question. What did you say? What did you mean by the answer?

A. The only thing I heard was the report to me by my brother, on his return from St. Clair.

Q. Was that the first time that you knew the boat was to be called the Winnebago?

A. He can testify to that better than I can.

Q. Was it the first time that you knew?

A. I think so.

Q. Now, was not that just after she was launched?

39 Objected to as immaterial.

Question repeated.

A. I cannot say as to that.

Q. Do you know when she was launched?

A. No, sir.

Q. Didn't you see an account of her launching?

A. I presume I did.

Q. Do you know what month it was that you saw her in the water there?

A. I do not.
Q. Had she at that time been completed?

Objected to as immaterial.
COURT: Do you know?
Note an exception.

Q. Had she at that time been completed, when you saw her in the water?
A. No, sir.
Q. Had she her engine in her at that time?
A. They were putting the engine aboard of the boat; just about starting to put that aboard.
Q. Now, do you remember what the weather was: whether in the spring or summer?
A. I cannot say.
Mr. CADY: All the same weather last year; we did not have any distinction.
A. I cannot tell you a man who lives like I do all the time and on the road; cannot tell days and dates.
Q. Was that all that you ever heard prior to the 23rd of June, when you received the note about the ownership of the boat?
A. I do not recollect.
Q. You may have been told, then, before you asked for the note, who the owner of the boat was?

Objected to as immaterial. Note an exception.

A. I do not remember.
Q. Did you make any inquiries?
A. I did not.
Q. Did you make any inquiries at any time?

Objected to as immaterial.

Q. At any time up to the time—we will say, up to the 1st of August?

Objected to as immaterial.
COURT: I cannot see any harm in that answer; did he or not? Same exception.

Q. It will be material before we get through.
A. Did I make any inquiry up to about the 1st of August?
Q. Yes, sir?
A. And after the note for $5,000 had been received?
Q. Yes, sir.
A. You mean did I make any inquiry prior to August 1st?
Q. Yes, sir?
A. No, sir, I did not.
Q. Did you at any time after November, 1902, to August 1st, learn from any source who the owners of the boat were?

Same objection and exception.

A. I did.
Q. When did you learn that?

A. When my brother returned from Port Huron.
Q. And you learned then for the first time who the owners of the boat were?
A. I presume I did.
Q. What did he tell you?
A. He will testify himself; he can probably tell you better than I can.
41 Q. I am asking you?

Objected to. Same objection and exception.

A. He is the treasurer of the company.

COURT: Take an answer.
Mr. OAKES: It appears by the schedule that at this time that all the material was furnished.
Mr. KREMER: No, it does not identify it with my schedule.

Q. What did he tell you?
A. He said that the Winnebago was in the water.
(Question repeated.) If you learned then for the first time who the owners of the boat were what did he tell you?

Objected to as immaterial.
COURT: Take an answer; note an exception; go on.

A. What did he tell me?
Q. About the ownership?
A. I do not recollect.
COURT: That is an answer.
Q. Have you not just stated that he told you who the owners were at that time?
A. No, sir, I told you, Mr. Kremer——
Q. Answer yes or no, whether you have not so answered; we will see.
Question repeated.
A. Yes, sir.
Q. Now, then, will you tell me what names of companies he mentioned as the owners of the boat?
A. I do not recollect.
Q. Do you remember whether he stated to you that Mr. Boland had an interest in the boat?

Objected to.

A. I do not recollect.
42 Q. Do you remember whether he said Mr. Thomas J. Prindiville had an interest in it?
A. I cannot recollect.

Objected to. Note an exception.

Q. Do you remember whether he told you that the Iroquois Transportation Company were the owners of the boat?
A. I do not recollect.
Q. When did you first find out that the Iroquois Transportation Company were owners of the boat?

Objected to as immaterial.

COURT: He has not, to my recollection, sworn to that.

Mr. KREMER: No, not yet.

Question repeated.

A. I cannot answer that.

Q. Can't you answer it because you were never told that they were the owners?

A. I was told that they were the owners.

Q. Can you tell me when was that?

A. I cannot recollect.

Q. Was it before you received the note?

A. I do not remember.

Q. Was it after you received the note?

A. I do not remember.

Q. Do you remember of the Columbia Iron Company failing or making an assignment?

A. I remember that quite well, sir.

Q. Was it before you received information of that failure?

A. That I learned who owned the Winnebago?

Q. Yes, sir.

A. I am not positive, but I think so.

Q. Now, at that time your note had not matured; at the time that they failed?

43 A. No, sir, not at the time — the failure.

Q. How did you come to ask them for that note?

Objected to; he has not said that he asked for the note at all.

Mr. KREMER: Your correspondence shows it.

Mr. OAKES: I beg your pardon; there is nothing in the correspondence shows it.

Mr. KREMER: Unless you kept that letter out it is in there.

Mr. OAKES: Not yet.

Mr. KREMER: Did you not put in all the letters?

Mr. OAKES: No, sir, you have them.

Q. Did you ask for this note by letter?

A. We asked for a settlement of our account.

Q. Did you not ask for notes?

A. No, sir, we did not ask for note; we asked for checks, for money.

Q. You remember, then, particularly of asking for a check?

A. Yes, sir.

Q. You remember particularly of not asking for a note?

A. We never ask for a note.

Q. You did not in this case?

A. I do not believe we did; I am not the financial end of the institution; I am the secretary.

Q. I understand you to say at that time—is your name Wm. Robbins?

A. Yes, sir.

Q. You say you are not the financial end of the company?

A. No, sir.

Q. You say you never asked for a note from these people at any time prior to their sending this note?

44 A. I do not remember.

Q. You will say you may have done so?

A. It is not customary with us to ask for notes.

Q. Your best recollection is that you did not?

A. There may be a case now and then we ask for a note when we know we cannot get a check.

Q. But your best recollection is, you did not ask for a note in this case?

A. I would not say.

Q. At that time, I understand you to say, you had an account against the Columbia Iron Works amounting to pretty nearly nine or ten thousand dollars?

A. Somewhere in that neighborhood. I have not the facts or figures with me. I can answer to the effect——

Q. It was between $9,000 and $10,000?

A. Somewhere in that neighborhood; yes, sir. A large amount. I do not remember just what it was.

Q. That was made up for charges, for other charges—ships than the Winnebago?

A. Including the Winnebago forgings.

Q. You kept no separate account with steamer No. 3, did you?

A. Our ledger shows it, each item. The ledger shows the vessel number to which the forgings applied.

Q. But all charged to the account of the Columbia Iron Works?

A. Yes, sir. We billed them all to the Columbia Iron Works.

Q. And all charged to the Columbia Iron Works in your books.

A. As ledger accounts go.

Q. You kept no separate ledger account with No. 3, or No. 1, or No. 5?

All subject to objection as immaterial. Note an exception.

45 A. Our ledger account plainly shows what the forgings went into, each vessel.

Q. Have you an account in your ledger for No. 1, or No. 2, or No. 3, or No. 5, a separate account, on a separate page?

A. No, sir.

Q. And these items appear as No. 1 and No. 3 in your account in the ledger, which is headed Columbia Iron Works?

A. It does.

Q. Did you send a statement, a monthly statement, to the Columbia Iron Works from time to time?

A. Yes, sir.

Q. And those statements were addressed to what?

A. The Columbia Iron Works, Port Huron, Mich.

Q. What did those statements show as to the amount?

A. The amount due from time to time, from month to month.

Q. Whatever there was due you from the Columbia Iron Works on the first of the month appeared in that statement ?

A. Up to and including the last day of the month.

Q. How often did you send those out?

A. Monthly.
Q. Every month?
A. Yes, sir.
Q. Do you know whether you sent them out on the first of June?
A. If it was not the first, it would be a day or two after, but it is customary to send all business statements out on the first day or two of the month.
Q. Will you look at that letter marked June 4th, 1903, and state how much there was due on that day of the month from the Columbia Iron Works?

46 A. At that time, Mr. Kremer, the statement shows a balance due of $7,656.10 on June 4th, 1903. Now, that amount averaged up, you probably see——

Q. I ask you just what it shows on the first of June?
A. Well, it shows the material there.
Q. Now, did you send a statement on the 1st of July?
A. Yes, sir.
Q. Have you any means of telling now how much there was due at that time?

Objected to as immaterial.

A. I have no information just now without facts and figures; just now I do not know.
COURT: When you do not know, that answers it.
Q. Do you remember that the note was given you on the 23rd of June? Do you remember that fact now from your correspondence?
A. I believe a letter is dated June 23rd, probably received in Buffalo, a day or two later, as the mails come.
Q. Now, on the 1st of July did you give them credit for that $5,000 on your account, for that $5,000 note?
A. No, sir.
Q. You did not give them credit?
A. No, sir.
Q. Will you say now you did not put that on your books to the credit of the Columbia Iron Works, that $5,000?

Mr. OAKES: I object to that as immaterial.
COURT: He can answer it yes or no.

A. Why, the receipt of your note; yes, sir. We could credit the account with the receipt of the note, $5,000.
Q. You so stated in that letter?
A. We acknowledged the receipt of the note; yes, sir.
Q. Now, will you look at the letter of June 27th of the Delaney Forge Co. and state whether you did not say in that letter you placed that to their credit?

47 A. (Witness reads letter—see page — of record.) Just as I say a moment ago, credit was given on our books.

Q. Now your statement sent out on July 1st would show the credit of the $5,000 note?
A. Yes, sir, it would.
Q. Do you remember now how much the amount was with that $5,000 credit on the 1st of July?

A. I do not remember.

Q. In the neighborhood of $5,000, was it?

A. I do not know the balance due July 1st, so that I can't answer that question.

Q. Do you remember whether you sent them a statement on August 1st?

A. We send out statements every month.

Q. Do you remember now what time the note was due?

A. It was received, I think, on June 23rd, sixty days; that would make June, July and August; that would be due about August 23rd.

Q. When it came due, what did you do with the note.

A. Presented it to our bank for collection.

Q. Did you present it to your bank or the Columbia Iron Works?

A. Why, they were forwarded, I suppose, to someone, a correspondent in Port Huron, according to their banking business.

Q. Do you know where the note is now?

A. No, sir.

Q. Did you see it after it was forwarded for collection?

A. That is an answer our treasurer can give you.

Q. If you do not know, say so.

A. I do not know.

Q. Do you know whether the note was paid?

A. I know it was not paid.

Q. How do you know?

48 A. Because payment was refused by the Bank in Port Huron.

Q. How do you know?

A. I presume it must have been returned to our treasurer, because the books show it was not paid.

Q. Did you go there to the Columbia Iron Works with the note?

A. No, sir.

Q. Did you go to the Bank of Port Huron?

A. No, sir.

Q. And, then, how do you know it was not paid, except by hearsay?

A. The note was evidently returned to us, undoubtedly, by our bankers in Buffalo, which is proof sufficient.

Q. You do not know whether that is returned or not, but you do not know where it is now?

A. I know it was never paid.

Q. How do you know that fact?

A. From the statement in our own office.

Q. Who told you?

A. Our president, our treasurer, our bookkeeper and our cashier.

Q. Your president, bookkeeper, treasurer and cashier told you it was not paid?

A. Yes, sir, because they had failed before that time.

Q. That is all the information you have upon that subject?

A. Yes, sir, that is all I have. I am thoroughly familiar with the business down there.

Q. You do not know where the note is to-day?

A. No, sir.

Q. When did you see the note?
A. When received.
Q. When next after that? Have you that date?
A. I do not remember when I saw it again.
49 COURT: Was this building or plant located on the side opposite the river, on the road that runs down towards Niagara?
A. No, sir, the ferry slip west of the Ohio basin, the slip between Chicago and L——
Q. There is a plant between Niagara——
A. That is the Columbia Smelting plant.
Q. It resembles it very much. You say you did receive a cash payment? Do you remember how much it was?
A. Yes, sir; that was a payment covering our stern frame for the Winnebago.
Q. Do you remember when that was paid, that cash payment?
A. I do not recollect the day; no, sir. It was in payment of the stern frame of the steamer Winnebago; received their check in payment of it; I think six hundred and fifty and odd dollars, that does not appear in the list there.
Q. I show you No. 2. How do your distinguish that as connected with No. 1?
A. Their letter ordering that work. Mr. Kremer would no doubt state that way with comment on the blue print, for tiller or quadrant No. 1; kindly get out for us as quickly as possible.
Q. Have you the letter there? Can you turn to the letter?
A. Yes, sir, amongst the list of letters.
Q. Well, as long as you say it is in the letter, that is all. We can look at it to-morrow; it won't identify itself. Your only means of identifying that blue print as being for No. 1 is by the letter?
A. Yes, sir, as a rule.
Q. And that is so with all the blue prints that do not identify themselves as No. 1 or No. 3. They are identified by letter if you identify them?
50 A. As a rule; yes, sir.
Q. I understand you, Mr. Robbins, to say that you did not tender that note. You did not take it up at any time and give it back to the Columbia Iron Works? I mean you individually or personally?
A. No, sir.
Q. You do not know what was done with the note?
A. No, sir. Our treasurer is the only man who can answer that.
Q. That is all.

Redirect examination:

Q. Now, on the several blue prints that have been introduced I see marked in red pencil on the back. Who puts those marks on?
A. That is done, Mr. Oakes, by our shipping department, or our office department. The moment the print is received, in order to make the records complete, we mark it by the engine number or the hull number.
Q. To make the records complete?
A. Yes, sir.

Q. Can you refer to this correspondence or to anything in the file that will refresh your recollection as to whether any of these materials claimed for, were furnished after you heard of the ownership of this vessel? You may refer to the correspondence or anything else that you may have to refresh your recollection?

A. I cannot answer that Mr. Oakes, or give you an answer; but I will say this, that all the material furnished by our company and applied upon the construction of the Winnebago was furnished prior to the receipt of the note from them.

Mr. KREMER: Prior to June 23rd?

A. Yes, sir. At that time we were going along with forgings for other vessels, the John C. Howard, and so on.

51 Q. You would not undertake to fix the date definitely?

A. I could not do that, to be sure.

Q. I believe it will be conceded by counsel, will it not, that this concern made a common law assignment on the 31st of July?

Mr. KREMER: Yes, I think that will appear.

Q. That is all.

HARRY LOVEJOY, sworn for plaintiff.

Examined by Mr. OAKES:

Q. Where do you reside?

A. Buffalo, N. Y.

Q. What is your business?

A. I am the consulting engineer.

Q. Where were you in the season of 1902, if you were connected with Columbia Iron Works? What is your capacity there?

A. In March, 1902, I went to St. Clair. I assisted in making the drawings for the first ship.

Q. That is hull No. 1, Winnebago?

A. That is what is known as hull No. 1, steamer Winnebago.

Q. State what your general duties were in the yard?

A. During the time the shop work was going on I was in charge of the mold loft, or laying out of all hull material and forgings and steel work that was put into the ship, to be used. That were going on the ship; to make forms or templets.

Q. To shorten this matter as much as possible, you have looked at this list of materials or schedule attached to the bill of complaint, have you not?

A. Yes, sir, I have.

Q. And do you know whether or not the material set forth there was furnished by the Delaney Forge & Iron Co. to the Columbia Iron Works?

52 A. Yes, sir, I know it was furnished to them.

Q. Do you know whether or not those materials were put into the construction of the steamer Winnebago?

A. Yes, sir, I know they went into her construction.

Q. That is all.

Cross-examination.

By Mr. KREMER:

Q. Do you know when the Winnebago was launched?
A. Yes, sir. I can give you the exact date, if I am allowed to consult my memoranda.
Q. Yes, sir, consult anything from your shoes up?
A. The Winnebago went overboard March 21, 1903.
Q. That, translated into English, means she was launched?
A. Yes, sir.
Q. Some of this material did not enter the Winnebago until after she was launched, the engine material?
A. Not until after she was launched.
Q. The engines were built right there?
A. They were built in the machine shop of the yard.
Q. Did you have any consultation with any representative of the Delaney Forge & Iron Co. with reference to any of these forgings at any time?
A. No, sir; not at any time while at St. Clair.
COURT: What do you call your business?
A. At present I am consulting engineer in Buffalo.
Q. Were you engineer up there?
A. In charge of the molding department.
COURT: For how many years?
A. During the whole time the yard was running.
Mr. KREMER: Do you remember who furnished the stem iron for the Winnebago?
A. I was told it came from Jones & Laughlin.
Q. You know the Delaney Forge & Iron Co. did not furnish it?
53 A. Yes, sir; I know they did not furnish it.

Adjourned.

MAY 12, 1904.

Mr. OAKES: I found Mr. Lovejoy, the witness we had on the stand last, was able to stay over until to-day.

Mr. LOVEJOY, recalled by Mr. Oakes:

Q. State whether or not you recognize and can identify blue prints showing of forgings that were gotten out for the steamer Winnebago by the Columbia Iron Works?
A. Yes, sir, I believe I would recognize the plans.
Q. I hand you a paper marked Exhibit "3" and ask you to state what that is?
A. Spare tiller.
Q. They are marked here "S. 1." State what that has reference to?
A. That designates the particular ship this tiller was to go on, steamer No. 1, as we knew her.
Q. Afterwards known as the Winnebago?
A. Yes, sir.

Q. Now, I show you a list of the items attached to the bill of complaint in the case, which you have stated you have seen?
A. I have seen this bill.
Q. Where does that appear in the list?
A. It is the last item, one tiller.
Q. I show you a paper marked Exhibit "4" and ask you to state what the paper is?
A. It is the front columns of her engine.
Q. Whether or not you recognize the print as the print furnished by the Columbia Iron Works?
A. Yes, sir, this is the front columns of the Winnebago's engine.
Q. Do you recognize the print as one furnished by the Columbia Iron Works?
A. Yes, sir.
54 Q. Where does that item appear in the schedule?
A. It is number 12.
Mr. KREMER: What is the date?
A. February 28th.
Q. These blue prints, state whether or not they were used for the plans for more than one ship?
A. Yes, sir; they were used for No. 1 and, I think, for No. 3.
Q. I show you a paper marked Exhibit 5, and I wish you would state what that is?
A. Rudder frame for hull No. 1 and, I think, No. 3.
Q. You recognize it as a print furnished by the Columbia Iron Works, do you?
A. Yes, sir.
Q. Where does that item appear in the schedule?
A. No. 7, December 13.
Q. I show you a paper marked Exhibit 9. I wish you would state what it is?
A. Stern frame for hull No. 1 and No. 3.
Q. Do you recognize that as furnished by the Columbia Iron Works?
A. Yes, sir.
Q. Where does that appear in the schedule?
A. It is not on this schedule.

No. 9 is offered in evidence.
Mr. KREMER: I want to object to it if it is not on the schedule.
Mr. OAKES: It has been referred to in testimony as having been furnished; part of it. It is not material especially.
Mr. KREMER: If they do not make any claim for it, why should we investigate it?
Mr. OAKES: We do not insist on it going in. It has not been referred to in testimony.

55 Q. I show you a paper marked Exhibit "6." Will you state what that refers to and what it is?
A. Valve stems for engine No. 1 and No. 3.
Q. Where do those items appear in the schedule?
A. April 30, No. 14.

Q. I show you Exhibit "2." Will you state what the paper is?
A. It is a quadrant forging for the cap.
Q. For the same ship?
A. Yes, sir.
Q. Print furnished by the Columbia Iron Works?
A. Yes, sir.
Q. Where does that appear in this schedule?
A. No. 13, April 30.
Q. I show you a paper marked Exhibit "8" and I wish you would state what it is, whether it is a blue print furnished by the Columbia Iron Works?
A. That is a Columbia Iron Works blue print, and it shows the detail that made up our crank shaft for steamer No. 1.
Q. And for No. 3 as well?
A. Yes, sir, for No. 3 as well, in duplicates.
Q. What items are shown in that item on the schedule?
A. Crank webs, item No. 9, January 14, and items 1, 2 and 3 of November 24th; and item No. 5 of November 26th. I guess that is all.

Mr. CADY: Did I understand that covered the crank webs of January 14th and November 24th?
A. Yes, sir.
Q. I show you a paper marked Exhibit "7." I wish you would state what it is?
A. Connecting rods for engine 1 and 3.
Q. Print furnished by the Columbia Iron Works?
A. Yes, sir.
Q. Where does this appear in the schedule?
56 A. Item No. 11, February 7th.
Q. Any other than that one item shown on this?
A. There is another item here.
Q. What is it?
A. I could not positively identify that item, though it is probably No. 15; I cannot swear to that.
Q. Referring to steel connecting rod caps?
A. Yes, sir. It is a peculiar thing for an order like that.
Q. Now, in the schedule, Mr. Lovejoy, the prints there seem not to have referred to item No. 4, crank pins. I wish you would take the exhibit and see if you can locate on the prints either crank pins, the outboard shaft or the steel thrush shaft?
A. The thrush shaft is not on here.
Q. You may take the entire list of prints and locate those three items; they seem not to have been accounted for in your statement?
A. Yes, sir, the crank pins are on here.
Q. They are on what exhibit?
A. Exhibit "No. 8." What are the other items?
Q. The steel thrush shaft and the outboard shaft?
A. They are not on there.
Q. You do not find those two prints?
A. No, sir, they are not here.

Q. Mr. Lovejoy, I wish you would state a little more fully than you did yesterday what your duties were at the Columbia Iron Works, or what your duties there would give you a knowledge of as to details of the construction of the ship Winnebago?

A. I had charge of the work of the Winnebago, first of laying her down and then of laying out such templets as could be used for punching, shearing, countersinking and getting the material ready to go into the ship in advance. To do that I must have had complete knowledge of everything entering into the structure of the ship.

57 Q. I think that is all.

Recross-examination:

Q. Did you make the blue prints you have referred to?

A. No, sir, made by a boy in the drafting room.

Q. Did you supervise the drawing of them?

A. No, sir.

Q. Who made the drawings of these goods?

A. A man by the name of Donovan.

Q. And did you see these blue prints before they were sent away?

A. I cannot swear I saw those; I saw duplicates.

Q. When you testified you saw these blue prints before, you saw them when you came to Detroit?

A. I cannot swear I ever saw them, that set.

Q. Do you know whether the articles mentioned in that set were manufactured, of your own knowledge?

A. Yes, sir.

Q. Do you know they were manufactured?

A. Yes, sir.

Q. How do you know that?

A. Because the ship has been running, and she could not run without them.

Q. Do you know whether those articles mentioned in the drawings went into the ship?

A. Yes, sir.

Q. Did you see them?

A. Yes, sir.

Q. You testified yesterday the quadrant referred to in these drawings went into the Winnebago?

A. Yes, sir.

Q. You swore yesterday the tiller went into the Winnebago while she was at St. Clair?

A. No, sir.

Q. When was this spare tiller delivered to the Winnebago?

58 A. I cannot give you the date.

Q. It was not before she was completed?

A. No, sir.

Q. Is it not a fact that it was delivered on a trip after she had been delivered, and when she was coming up with a cargo?

A. I believe it was delivered to her on her first trip.

Q. And that was about in the neighborhood of August 1st?
A. I do not remember the date of her leaving here.
Q. Do you remember the date the ship left the Columbia Iron Works?
A. No, sir, I have not a record of that.
Q. If it was on the 19th or 20th of July, what do you say as to when this was, how many days afterwards?
A. Her return occurs four or five or six days after leaving here.
Q. Do you remember a temporary tiller was made for her to use on the first trip?
A. Yes, sir.
Q. Do you remember using any of the valve stems mentioned in these drawings?
A. Yes, sir; she had three of them.
Q. Will you state whether those made, as called for by these drawings, were used on her?
A. Three were used as made by them on the Winnebago.
Q. The identical three articles in this case?
A. Yes, sir..
Q. Is it not a fact that these did not get there on time and that you made some in the yard to take their place?
A. Not to my knowledge.
Q. It might have been done so?
A. It might possibly have been so.
Q. And then you are not positive about their being used?
59 A. There might have been duplicates made.
Q. And used in place of these?
A. Possibly.
Q. Of these various drawings, how many of the drawings referred to there were used in the construction of the engine?
A. Those pertaining to our crank shafts, connecting rods, front columns and valve stems.
Q. What was there used directly on the ship in the condition it was sent to the yard?
A. I do not understand you.
Q. There were parts made that were put right into the ship as they were received, without any further finishing or altering?
A. No, sir.
Q. All had to undergo a process of finishing?
A. Yes, sir..
Q. Where was the engine for which these various parts were furnished built?
A. In the machine shop of the Columbia Iron Works.
Q. Do you know whether you received the various items that the duplicates called for? Do you remember when they came there, whether labeled for No. 1 or No. 3?
A. No, sir.
Q. They were not so labeled?
A. I will not swear they were or were not.
Q. You are not certain whether they were or were not?
A. No, sir. It was immaterial whether they were or not.

Q. They were duplicates?

A. Yes, sir.

Q. And they conformed in the finished parts of the engine, in every case, where they were intended for an engine?

A. I do not understand you.

60 Q. You received the columns, for instance, in the rough?

A. They were rough-machined.

Q. In every case they had to be finished before they could be put in?

A. Yes, sir.

Q. That is true of the valve stems and all the stuff there?

A. Yes, sir.

Q. They came in the shape of crude, rough forgings?

A. They were rough-machined.

Q. They were forgings?

A. Yes, sir; had to be roughed into shape.

Q. And they had to be shaped and finished and polished?

A. They had to be drawn to their finished size.

Q. The parts were interchangeable and could be used in engine No. 1 or No. 3?

A. They were built from the same drawings; yes, sir.

Q. How did you identify these blue prints?

A. On the duplicates of them; they had them. I have seen all the parts. I saw the drawings during their construction, and I am quite familiar with the Columbia Iron Works' form of drawings.

Q. Do you know the sizes of this engine, independent of the drawing, or blue prints; the various parts?

A. I have personal data that describes a good deal of it.

Q. What was the length of that spare tiller?

A. I have no drawing of that.

Q. You have no drawing of that?

A. No, sir.

Q. And then you have no means of identifying that, except as it identifies itself?

61 A. Well, I saw that tiller on the Winnebago last Sunday.

Q. And then you do know what the length of it is?

A. Only approximately; I should say in the neighborhood of four feet.

Q. Suppose a man brings two blue prints here, one was four and one-half feet and one four feet, would you be able to tell if they were both alike in shape, whether that was for the Winnebago or some other ship?

A. I could tell you by looking at the blue print if it was marked hull No. 1.

Q. Unless it was marked you could not tell?

A. No, sir.

Q. What was the length of the column used?

A. Oh, in the neighborhood of nine feet.

Q. Can you tell from the blue print, which did not identify it as the Winnebago, that they were Winnebago?

A. If it was a blue print furnished by the Columbia Iron Works I would say it went into the Winnebago or John C. Howard.

Q. If it contained no evidence, positive evidence of itself, could you tell?

A. No, sir.

Q. Is not that true of all these blue prints?

A. I could identify some if there was no Columbia Iron Works' stamp upon them.

Q. What could you identify?

A. The rudder frame.

Q. What is there about that that enables you to identify it?

A. Why, the general appearance of it.

Q. Is it any different in general appearance from the rudder frame in any steel steamer for that use?

A. It had a slightly unusual shape; that is a shape I am not familiar with for that class of steamer.

62 Q. Did you notice wherein it differed from any other steamer?

A. Yes, sir, it tapered rather more towards the shoe.

Q. The fact that it tapered away more is the only difference between it and any other rudder for a similar ship?

A. Well, there was another difference in the forging put across from the rudder stock to the balance side, which is quite usually left out.

Q. What do you mean by the words quite usually?

A. Well, I have seen such rudder frames without any such brace.

Q. You have seen some with such a brace?

A. Yes, sir.

Q. And then it comes right back to the difference in the slant, after all?

A. Some have more, some have less than this.

Q. And then distinctly coming back to this, that unless you identify the blue prints themselves, that it was not a drawing like the rudder of the Winnebago?

Objected to. It assumes something.

Question repeated.

A. I cannot identify it positively without the shipyard marks.

Q. Now, is there any other blue print that you can identify as being a drawing for the Winnebago without the marks of a blue print which you would identify; that is your statement?

A. I would not undertake to identify any of them without the shipyard marks.

Q. And these blue prints you have testified to all bear marks, more or less; that they came from the Columbia Iron Works?

A. Yes, sir.

63 Q. That is really what you relied upon in shipping them?

A. Yes, sir.

Redirect examination:

Q. Where the word "S. 1:" appears or the little memorandum appears on any of these blue prints does that enable you to identify it?
A. Yes, sir, very clearly.

Mr. KREMER: I object, because the blue prints identify themselves to a certain extent, and under the witness' concession he identifies it by the marks upon it; that is the only evidence that he has those are the blue prints.

COURT: You may have an objection, and exception, but under our practice we have to receive it.

Mr. KREMER: Perhaps we might just as well thresh that out here; the Supreme Courts have expressly decided that these cases are to be tried upon the practice that prevails in law cases.

COURT: Where is that authority?

Q. I do not care to insist upon it; I will re-form the question. Where "S. 1" appears upon any of these drawings shown you, what does it signify; what does it mean?

Objected to, because it is already testified that No. 1 means——

COURT: You may answer it.

A. It means that the articles included were made or designed for steamer No. 1.

Q. And they are the marks or memoranda that you refer to that would enable you to identify the various blue prints, if so marked.

A. Why, I am quite familiar with those drawings, the style of laying the dimensions.

Q. That is all.

64 J. G. HAMBLEN, JR., sworn for plaintiff.

Examined by Mr. OAKES:

Q. What is your business?
A. Lawyer.
Q. With what office are you connected?
A. Shaw, Warren, Cady & Oakes.
Q. Have you any knowledge of a certain promissory note, signed by the Columbia Iron Works, given to the De Laney Forge & Iron Company having been sent to the office of Shaw, Warren, Cady & Oakes?
A. Yes, sir.
Q. Approximately when?
A. Some time in the early summer of 1903.
Q. That note was due at what time?
A. It was due on the 25th day of August, 1903.
Q. What, if anything, was done with you, and by you, with that note, in the way of a tender, or surrender of it?
A. I took this original note to St. Clair, and tendered it to R. S. Jenks, of the Columbia Iron Works, on the 26th day of August last and the tender was refused.
Q. That is the note in question?

A. Yes, sir, that is the original note.

Exhibit "10" offered in evidence. That is all.

Cross-examination.

By Mr. KREMER:

Q. When did you remember who sent this note to you?

A. I do not remember exactly, but I suppose it came from the De Laney Forge & Iron Company.

Q. Are you quite positive of that; have you any means of knowing that positively?

A. It is possible we had some correspondence, which shows that that note was enclosed, otherwise I would not have any definite information.

65 Q. It bears an indorsement on the back as having been assigned to the People's Bank, of Buffalo; do you know whether you received it from the People's Bank, of Buffalo?

A. I think not.

Q. You have no positive knowledge either way?

A. Yes, sir, I remember it; I am quite positive it came from the De Laney Forge Company people direct.

Q. What means have you of knowing that?

A. I think the due date of that note was about to arrive, and we were advised of that fact, and asked the De Laney people to forward it to us as I remember it. I think the note was not protested there.

Q. Whatever knowledge you have upon that subject comes through letters?

A. Oh, yes.

Q. Yes, sir, I wanted to keep it straightened out; the testimony whom it was received for; it comes by letters?

A. That was your own testimony.

COURT: I think we will leave it in; it will do no harm; we have no jury.

Mr. OAKES: I wish to make a tender of this note.

Mr. KREMER: I have no objection.

COURT: I can see no harm; it is a little broader than an action at law. The Supreme Court has said the Chancery of the seas, and if there is any distinction at all, it is a broader inquiry than one at law. If there is any error I would rather admit it, and submit to the error that way than to exclude it; you need not have any trouble about it.

Mr. OAKES: I make a formal tender of this note in court, for the benefit of whom it may concern, unpaid.

AMOS R. ROBBINS, sworn for Plaintiff.

Examined by Mr. OAKES:

Q. Where do you reside?

66 A. Buffalo, N. Y.

Q. What is your business?

A. Bookkeeper for De Laney Forge & Iron Company.

Q. I do not know whether the incorporation of this company was

proven yesterday; I will ask you if the De Laney Forge & Iron Company is a corporation?

A. It is.

Q. Organized under the laws of what State?

A. The State of New York.

Q. And the place of business at Buffalo?

A. At Buffalo.

Q. Now, Mr. Robbins, I wish you would just state to the Court whether or not any forgings were furnished by your company to the Columbia Iron Works for use in the construction of the steamer Winnebago?

Objected to as leading.

COURT: Let him tell what he knows, if anything.

Q. What do you know, if anything, about the furnishing of any material to the Columbia Iron Works for the steamer Winnebago?

A. I know that the De Laney Forge & Iron Company furnished the forgings because I took the contract.

Q. You may look at the schedule attached to the bill of complaint and state whether or not your knowledge extends to the items in that list?

A. It does, to all of them.

COURT: I take it you are the son of the man who was on the stand yesterday?

A. A younger brother.

COURT: You are about 28?

A. Thirty-four.

Q. What were the terms and conditions under which these articles were furnished you?

Objected to, unless the witness knows, and if in writing, the writing is the better evidence.

67 COURT: You can ask first whether it was in writing; was it in writing what you did; did you sign up a contract?

A. It was not.

Mr. KREMER: It may have been by correspondence, which is the same thing.

COURT: If he had the negotiations through him we will have to get at the ground-work through him.

Q. Did you have anything to do with the negotiating for the furnishing of these materials yourself?

A. I did.

Q. State to the Court, if you know of your own knowledge, what the terms and conditions were?

A. They were our usual terms and conditions of forgings for ships.

Q. What are the usual terms and conditions as you refer to them?

A. The terms are thirty days net from date of invoice, but in case of forgings for ships we usually grant farther time, with the knowledge that if a builder does not pay for the forgings the boat is liable under the lien law.

Mr. KREMER: I object to the last part as irresponsive.
COURT: That is irresponsive; we will leave it at present.
Mr. OAKES: I think I would be the one to object to the irresponsiveness.
Mr. KREMER: When he answers it, and tries the case, and decides it, it is rather conclusive.
COURT: Start again.

Q. With reference to the various articles enumerated in this schedule, Mr. Robbins, what can you say to the Court, of your knowledge about the prices, whether or not they are fair?
A. Those were the prices that I quoted.
Q. But what do you say as to their being fair and correct prices?
68 A. They are fair and correct.
Q. How about the balance remaining due on the bill there, as stated on July 16th last?

Objected to.

A. That is the correct amount.

Objected to.
Mr. CADY: Ask him what balance is due?
Mr. KREMER: I object to the word due, if paid; then that is one thing and if not that is another.

Q. What balance remains unpaid for the goods furnished in that bill of complaint of July 16th last?
A. $1,999.90.
Q. Do you know anything about the manufacture of these goods, and the shipment of them to the Columbia Iron Works?
A. I do.
Q. State what you know of the manufacture of them, the furnishing of them, the shipment, and the use of them afterwards?
A. They were manufactured, and I state they went to the Columbia Iron Works on the various dates mentioned in the papers there, consigned to them at their St. Clair yard, and used on the Winnebago.
Q. These blue prints, I believe, you have examined, Nos. 2, 3, 4, 5, 6, 7, 8, and where did they come from, if you know?
A. From the Columbia Iron Works' office, at Port Huron.
Q. To whom?
A. To the De Laney Forge & Iron Company.
Q. That is all.

Cross-examination:

By Mr. KREMER:

Q. Now, Mr. Robbins, did you see the steamer Winnebago
69 at any time while she was in the course of construction?
A. I did.
Q. Did you see any of these forgings at Buffalo?
A. Yes, sir.
Q. You say you were the bookkeeper?

A. Yes, sir.
Q. What had you to do with the manfacture of these things?
A. Nothing to do with the manufacture of them.
Q. Were you at that time building other stuff for other shipments of similar stuff?
A. That is something I could not say.
Q. Do you identify these articles mentioned with the blue prints in that ship?
A. Yes, sir.
Q. How do you come to do that?
A. Because I assisted in the shipping of some of them.
Q. Those that you assisted in shipping you saw?
A. Yes, sir.
Q. Those that you did not assist in shipping you did not see?
A. I did.
Mr. CADY: You did not see, or did see?
A. I did, but did not assist in shipping them all.
Q. Did you at any time see your forgings in the machine shops of the Columbia Iron Works?
A. I did.
Q. Did you see the engine of the Winnebago?
A. I did not.
Q. Could you when the engine was completed have identified your forgings in that engine?
A. I could.
Q. But you didn't see, in a general way, you did not?
A. I identified quite a number, those that I have seen.
70 Q. You did not see the engine?
A. No, sir, I did not.
Q. And then so far as the things for the engine are concerned, you have no means of knowing whether they went into the engine, or not, if you did not see the engine?
A. I see them all finished up, ready to put in the engine.
Q. You did not see them in the engine after the engine was done?
A. No, sir.
Q. Did you see the quadrant on her?
A. No, sir.
Q. Did you see the spare tiller on her?
A. No, sir.
Q. Do you know when the spare tiller was put on her?
A. No, sir.
Q. Do you know when the quadrant was put on her?
A. No, sir.
Q. Did you see the rudder frame in her?
A. I did.
Q. That rudder frame is filled in with metal, by the Columbia Iron Works?
A. I do not know what they fill it in with.
Q. It would be filled in; different from what it was before it was filled in?
A. I saw it with the plates on.
Q. Where?

A. In their shop.
Q. You did not see it after?
A. Yes, sir.
Q. Where?
A. On one of their boats.
Q. When?
A. I could not recollect the time.
Q. Had you any means of identifying it?
71 A. Yes, sir, I did.
Q. What means was there about it that indicated it came from your place?
A. Well, when the rudder frame had the plates on it, and lying in the shop, my attention was called to it, that they had to put pieces under the plate to make it thicker at the pintal end of the rudder; that was our rudder, and pointed out to me as our rudder, and I knew it was our rudder, and I saw that same rudder on the boat.
Q. Did you identify it by what was put in by the pintal end?
A. No, sir, I identified it from turning, and our hammering.
Q. Now, when put in the boat the hammreing had been removed by the operation of finishing it?
A. Oh, no.
Q. Do you mean to say you stood there on that dock, or on the boat, and looked at it close enough so that you could tell your hammering?
A. Yes, sir.
Q. What is there peculiar about your hammering?
A. Nothing peculiar about it at all, but the rudder body and balance bow, they are not machine hammered at all.
Q. How could you identify it by the hammers?
A. You have to identify it by other means.
Q. Is it not a fact that having been told it was the Winnebago rudder, for the Winnebago, when you saw a rudder in the Winnebago, you came to the conclusion it must be yours?
A. Yes, sir.
Q. Now can you tell the rudder frame of No. 1, from that of No. 3?
A. Yes, sir.
Q. Why?
72 A. Because there was a corrected print, making the bow of the stem, all the way down to the pintal end without any taper in it at all.
Q. Were the blue prints made at the same time?
A. No, sir.
Q. The blue prints provided for two rudders?
A. No, sir.
Q. These articles, how were they shipped; how were they addressed?
A. Columbia Iron Works; marked consignment C, St. Clair, Mich.
Q. That was the shipping mark of all of them?
A. Yes, sir.
Q. Now when duplicates were called for, did you send the dupli-

cates, for instance, two sets of anything, did you send them at the same time?

A. I did not quite catch that?

Q. For instance, if you had six valve stems which were duplicates, and three would be sufficient for a ship, would you send the six together?

A. Yes, sir.

Q. And when you did that did you mark them separately, No. 1 and No. 2?

A. On what?

Q. On these various forgings, for instance, valve stems?

A. No, sir.

Q. That is in duplicate parts, in all cases you did not separate the duplicate and the original?

A. No, sir.

Q. In what way did you charge these items of forgings on your books?

A. Boats 1 and 3.

Q. In your ledger, if you wanted to find out what was due, what account would you turn to in your ledger?

73 A. Columbia Iron Works account.

Q. Did you have a separate account in your ledger for Nos. 1, 3, 4 and 5?

A. They were usually marked in the ledger under the head of Columbia Iron Works.

Q. For instance, if there was anything peculiar to No. 1, you charged it to No. 1 in your day book, and posted it in the ledger to the account of the Columbia Iron Works?

A. To the account of the Columbia Iron Works.

Q. And these people at the other end where there were duplicates used were not much concerned, as to which one they wanted to put in a particular boat?

A. I should judge that they did.

Q. Can you say that the valve stems that you shipped there were put in the Winnebago's engine?

A. Can I say?

Q. Yes, can you testify to that positively?

A. I can testify positively they were put in there.

Q. You shipped them to the Columbia Iron Works and the disposition rested with them?

A. Yes, sir.

Q. And that is true of all the forgings, excepting the rudder frame, which you identify by the hammering?

A. Well, I could not say it was true, because I do not believe the Columbia Iron Works were buying an engine and hull forgings for the mere fun of buying.

Q. From your point of view, they were not in the business for——

A. For pleasure.

Q. And it would be a pleasure if they used them on some other boat, is that the idea?

A. No.

Q. And then you think then from a business point of view, they would be liable to use these things in their boat?

74 A. From a business point of view, in their boats.

Q. But of your own knowledge, you do not know, not having seen them, whether they were or not?

A. No, sir, I cannot say that I do.

Q. Now did you when you received that note, you remember that fact, do you, of receiving a $5,000 note?

A. Yes, sir.

Q. Was it part of your business to enter that item on the books?

A. Yes, sir, it was.

Q. How did you enter it?

A. Made a memorandum of it and kept it there.

Q. How did you enter it, in your journal or day book?

A. We did not make any daily entry of it, just made a note that the note was there.

Q. Did you keep a bills receivable account?

A. Yes, sir.

Q. Did you credit bills receivable on that account?

A. Yes, sir.

Q. And did you also credit the Columbia Iron Works with the amount?

A. No, sir.

Q. Just give me the exact entry you made in your books when you received that?

A. A sort of a bills receivable account, and put in there and that was all there was to it.

Q. What was it, bills receivable, Dr., to Columbia Iron Works?

A. No, sir, just merely a memorandum.

COURT: Did you keep double entry?

A. Yes, sir.

COURT: The old double entry would be bills receivable, Dr. $5,000, and then credit to Columbia Iron Works, and that would make that balance.

Q. What was the entry first that you made?

75 COURT: If you made a full entry it would be something like that; what was it?

A. It is so long ago, I can hardly recollect.

COURT: Are you a bookkeeper?

A. Yes, sir.

Q. There must be something of that kind?

Mr. OAKES: I suppose he can testify what he usually does.

COURT: If you did the usual thing, what would you do?

A. Oh, usually I would give the Columbia Iron Works credit for it, and debit bills receivable.

Q. You cannot say now, you did not do that?

A. No, sir.

Mr. CADY: I wish to enter an objection to this line of cross-examination; I think it is entirely immaterial under the Sarmiento case, appearing in the 110 Michigan. (Citation read.)

COURT: It has to be a bargain to take it as money.

Q. What became of the note that you received?

A. The note was sent to the People's Bank of Buffalo, or rather taken to the People's Bank of Buffalo, by our Mr. John Sloat, president and treasurer, for collection.

Q. Do you remember when that was?

A. No, sir, I do not.

Q. Did you at any time get back the note?

A. Yes, sir.

Q. And when you got it back what did you do with it?

A. I could not say what Mr. Sloat did do with it.

Q. Did your company continue after that in the business of furnishing this kind of forgings for the constructions of ships on the great lakes?

A. Yes, sir.

Q. Doing other work for other ships?

A. That I cannot recollect.

76 Q. You say you went to St. Clair or Port Huron to solicit this business?

A. Yes, sir, I inquired from the Columbia Iron Works——

Q. If you did not know anything about it, how could you tell them you were manufacturing this kind of stuff?

A. I have been long enough in the business to know what was going on.

Q. And then if you knew—or did you manufacture anything of this kind before?

A. Not personally I did not, my people did for 50 years before.

Q. You were aware of that fact?

A. Yes, sir.

Q. And you have charged up similar stuff to other shipyards?

A. Yes, sir, and anything built on the great lakes.

Q. And the plan which you followed here in manufacturing, delivering and shipping and entering upon your books, was the same as in all other cases?

A. In all other cases.

Q. And these various forgings went to shipyards where?

A. Why, they went to shipyards all over the region of the lakes.

Q. To Ohio?

A. Yes, sir.

Q. To Illinois?

A. Yes, sir.

Q. To Minnesota, or rather Wisconsin?

A. Yes, sir; Bay City, and all these places.

Q. Where they build ships?

A. Yes, sir; San Francisco, Seattle, and Richmond, Va.

Q. Had you ever received notes like in this case on account of such forgings?

A. Not to my recollection.

77 Q. This is the first time they ever sent a note of that sort?

A. To my recollection, it is.

Q. And the terms were 30 days from the date of invoice, or usual terms?

A. Yes, sir.

Q. Now, how often did you send statements of the Columbia Iron Works to them, of their account?
A. Once every month.
Q. What did that statement show?
A. It showed the balance of the previous month, and the delivery of goods for the last past month.
Q. So that the statement for the first of May would show the balance after the first of April, and the items delivered from the 1st of April to the 1st of May?
A. Yes, sir.
Q. And did you send these all from the first items, every month until say the first of August?
A. Yes, sir.
Q. Do you remember sending one the first of August?
A. No, sir, I do not. I made up the statement and the office boy mails them.
Q. The note bears date June 23rd; you received it soon after that; now, what would your statement for July show?

Objected to, what it did show; the statement itself is the best evidence; I think he should produce that.
COURT: We will have the statement here.
Mr. KREMER: We haven't any statement.

Q. Are you able to show what it would show.

Mr. KREMER: I want to show whether it gave credit for the note or not.
Mr. OAKES: It should be produced.
Mr. CADY: We haven't any control of it after it reaches the Columbia Iron Works.
COURT: It is not the governing point; what their books
78 show, unless it shows affirmatively they agreed to take it as cash; if they received it as payment, and dealt with it in that way.
Mr. KREMER: Your honor can understand, if the statement showed a lesser amount or the amount of the debt decreased by $5,000 it certainly was some evidence.
COURT: You can take it; it is not excluded.
Mr. OAKES: If counsel on the other side are able to present all our correspondence, they should be able to present the statement if they have it.
Question withdrawn.

Q. I will show you a letter of June 4th; can you tell me from that letter what the balance due the Delaney Forge & Iron Co. from the Columbia Iron Works was on the 1st of June, 1903?
A. $7,656.10.
Q. And after the receipt of that note, what would the next statement show as the indebtedness?
Mr. CADY: What would, or what did?
Q. Either way.

Objected to; if you have the statement, it is the best evidence.

COURT: Go on.

A. I do not know what it would show.

Note an exception.

A. I do not know what it would show, because I do not know what was shipped in that month.

Q. But the indebtedness would show as being decreased by $5,000?

Objected to; he is examining the witness from a paper, and I ask that he be permitted to see it, and not go blindly.

Mr. KRAMER: I am not examining him from a paper; I had a paper in my hand.

Question repeated.

79 A. I do not know how the statement read; let me have the question again.

COURT: He will pick it up again; you do not have to hunt around for his meaning; if you say you do not know that stops it; he will prompt you in some other form, that is the counsel's duty.

Q. The indebtedness, as you say, on the 1st of June was something over $7,000; will you examine your bill of particulars and see if you furnished any goods between the 1st of June and the 1st of July?

A. No.

Q. Now, then, the indebtedness then would remain the same on the first of June, with the exception of the credit of the $5,000 note on the 1st of July?

Mr. CADY: I object to the use of the word credit; it assumes a fact that the witness has not testified to.

COURT: I do not remember anything more than practically a credit of the note.

Mr. CADY: It assumes it has been credited.

COURT: It would be in writing, the usual entry; he did not say in fact that a credit was given, but the usual account; he seems indefinite about it; anyway the letter would be the better evidence.

Q. Now, for the purpose of refreshing your recollection look at the letter of this date, June 27th. (Witness examines letter.) Whether now you might be able to state what amount that the letter shows is the balance on the 1st of June, and the bill showing no delivery of goods during June, and the receipt of a note of June 23rd, will you now state what the statement of the 1st of July would show?

Mr. OAKES: I object to what the statement would show.

COURT: Take an answer now.

A. The statement if it was credited would show this $5,000.

80 Q. Less than on the 1st of June?

A. Yes, sir.

COURT: That is almost axiomatic.

Q. Was there any agreement in writing or verbally between you and the Columbia Iron Works, that these forgings were to be used in any particular ship?

A. I believe our correspondence states used on boats 1 and 3; and engines 1 and 3; also the blue prints.
Q. That is all the agreement that there was?
A. Yes, sir.
Q. That is all.

EXHIBIT "1."

PORT HURON, MICH., *July* 11, 1902.

Delaney Forge & Iron Co., Buffalo.

GENTLEMEN: In accordance with your proposition of even date, we would ask you to enter our order for one rudder frame, one stern frame, in accordance with drawings furnished you at a price throughout of 16 cents per pound. Delivery on this order is to be made within four weeks' time at St. Clair, Mich.

Very truly yours, COLUMBIA IRON WORKS,
W. F. DURAND.

Memorandum, red ink: "Boat No. 1."

PORT HURON, MICH., *Oct.* 21, 1902.

Delaney Forge & Iron Co., Buffalo.

GENTLEMEN: You may enter our order for one stern and rudder frame at the price of 16 cents per pound, same to be delivered
81 at St. Clair, Mich., by the 15th of November. The above to be as per accompanying blue prints.

Yours truly, COLUMBIA IRON WORKS,
By F. B. JENKS, *Secretary.*

Memorandum, red ink: Boat No. 3.

PORT HURON, MICH., *Nov.* 5, 1902.

Delaney Forge & Iron Co., Buffalo, N. Y.

GENTLEMEN: We hereby accept your proposition of October 23rd for forgings at the following rates per pound, f. o. b. St. Clair, Mich.: 14 shafts, 5 cents; two thrust shafts, 7½ cents; 12 crank webs, 9 cents.

Very truly yours, COLUMBIA IRON WORKS,
By F. B. JENKS, *Secretary.*

Memorandum, red ink: Boats 1 & 3.

I might say on the first letter I read, a memorandum appears in red ink, "Boat No. 1."

Mr. GRAY: That is not a part of the letter; I do not think any private memorandum should be read into the record.
Mr. KREMER: We want to object to that.
Mr. OAKES: I think Mr. Robbins testified to that; if there is any question, we will put Mr. Robbins on.
Mr. KREMER: The point is, their memorandum could not bind us.

Mr. ROBBINS, recalled by Mr. Oakes:

Q. I show you a package of 28 letters, marked Exhibit "1," and call your attention to a memorandum on some of them in red ink, "Boat 1," or "Boat 3," Boats 1 and 3, and also other memoranda, and I call your attention especially to the marks in red ink, specifying the boat number, and ask you who put the marks on those letters?

82 A. I did.

Q. At what time with reference to the receipt of the letter?

A. When the letters were received, and we were crediting him with the orders on the ship.

COURT: For what purpose?

A. For the purpose of identifying the letters, and the forgings.

Q. The first letter, memoranda, "Boat No. 1."

Mr. KREMER: We want to object to these going in evidence, because they were made without our knowledge or consent.

COURT: I will take that into consideration.

A. That "Boat No. 3" is on the second letter.

Q. And boats 1 and 3 and so on.

Mr. KREMER: I object to the second letter; we have not identified, as part of the stock they delivered — we have not identified as No. 3, that is entered, they said, together.

Mr. OAKES: They run together.

A. The fourth letter——

Mr. GRAY: I do not think he should be testifying to that.

PORT HURON, *Dec.* 31, 1902.

Delaney Forge & Iron Co., Buffalo, N. Y.

GENTLEMEN: I enclose herewith blue print showing forgings for connecting rod, and for lower cap, which we are desirous of obtaining as soon as possible. Assuming that you can give to this matter your very early attention, we will ask you to enter our order for same at your lowest price, which we assume will be about the same as for the shaft forgings recently furnished. It is understood these articles should be made of suitable material for connecting rods, and that they will be furnished in the condition in which such forgings are usually prepared for the builder. It will be noted, of course,

83 that the dimensions here given are all finished sizes. If there is to be any delay in shipping the entire order, we will ask you to ship one set of three each, in advance of the remainder, as we positively must have the forgings for one engine at the earliest possible moment. In the same connection, let me urge you to use the utmost expedition in forwarding the crank slabs, which were ordered from you some time ago. Here, again, if it is impossible to send the entire order promptly, please send us six slabs or sufficient for one engine, without further delay. The remainder of the shafting is here, and we are held up from completing the crank shaft for the

lack of the slabs. Bespeaking for these various matters, the promptest attention possible, we remain,

Very truly yours, COLUMBIA IRON WORKS,
By W. F. DURAND.

The memorandum on that in red ink is "Boats 1 and 3."

ST. CLAIR, MICH., *Jan.* 5, 1903.

Messrs. Dalaney Forge & Iron Co., Buffalo, N. Y.

GENTLEMEN: Please hold work on the rudder which you are forging for the Columbia Iron Work, St. Clair, Mich., for I wish to change the drawings if you are not too far advanced, and oblige,

Yours truly, HENRY RICE,
General Sup't.

Perhaps it should be stated, as is the fact, that every one of these letters is written on the letter head of the Columbia Iron Works.

ST. CLAIR, MICH., *Jan.* 10, 1903.

Messrs. Delaney Forge, Buffalo.

GENTLEMEN: Enclosed you will find corrected print for 84 rudder; the change which I want is marked in ink; also find print for quadrant. Please forge quadrant according to drawing, one for each of the two boats.

Yours truly, HENRY RICE, *Gen. Sup't.*

A memorandum in red ink: "Rudder boat No. 3, Quadrant boats Nos. 1 and 3."

PORT HURON, MICH., *Jan.* 12, 1903.

Delaney Forge & Iron Co., Buffalo, N. Y.

GENTLEMEN: We hand you herewith our check for $651.20, which is to apply on our account, the receipt of which please acknowledge.

COLUMBIA IRON WORKS.

ST. CLAIR, *Jan.* 16*th*, 1903.

Delaney Forge & Iron Co., Buffalo, N. Y.

GENTLEMEN: Kindly let us know when we will get the stern post for ship No. 3. We are in great need of it and hope you will favor us with an early shipment. Hoping to receive an immediate reply, we are,

Yours truly, COLUMBIA IRON WORKS,
HENRY RICE, *Gen. Sup't.*

ST. CLAIR, MICH., *Jan.* 23, 1903.

Delaney Forge & Iron Co., Buffalo, N. Y.

GENTLEMEN: We prefer having the crank slab for the engine shafts finished to 6⅜ instead of 6⅝. There are 9 yet to come and

would be pleased to learn, if it is yet too late to make the change above mentioned. Trusting to receive an immediate and favorable reply, we remain,

Yours truly, COLUMBIA IRON WORKS,
Per HENRY RICE, *Gen. Sup't.*

85 ST. CLAIR, MICH., *Jan. 24th*, 1903.

Messrs. Delaney Forge & Iron Co., Buffalo, N. Y.

GENTLEMEN: Enclosed find blue print for steel columns. Please forge according to size and number shown on print.

Yours truly, COLUMBIA IRON WORKS,

In red ink: "Boats No. 1 and 3."

ST. CLAIR, MICH., *January* 26, 1903.

Messrs. Delaney Forge & Iron Co., Buffalo, N. Y.

GENTLEMEN: Enclosed you will find print for thrust shaft for steamer Buhl (that is outside of course) which we are repairing; hoping you will give this your immediate attention and favor us with an early shipment, we are,

Yours truly, COLUMBIA IRON WORKS,
Per HENRY RICE.

ST. CLAIR, MICH., *Feb.* 2, 1903.

Messrs. Delaney Forge & Iron Co., Buffalo.

GENTLEMEN: Please let us know by return mail when we will get the pieces shipped ordered for the steamer Buhl, and also the columns for engines 1 and 3. When may we expect for a certainty, our stern post for ship No. 3? We are almost at a standstill for these forgings, and desire to have them here at the very earliest possible date.

Trusting you do not delay in replying or in shipping our forgings, we are,

Very truly yours, COLUMBIA IRON WORKS,
Per HENRY RICE, *Gen. Sup't.*

86 PORT HURON, *Feb.* 18, 1903.

Delaney Forge & Iron Co., Buffalo, N. Y:

GENTLEMEN: In reply to your wire of the 17th, shafts and connecting rods, shipped us Feb. 6th, have been received.

Yours truly, COLUMBIA IRON WORKS.

ITHACA, N. Y., *March 2nd*, 1903.

Delaney Forge, Buffalo, N. Y.

GENTLEMEN: As consulting engineer for the Columbia Iron Works, Port Huron Mich., I wish to ask if you can hurry the rest of our order forward. The delivery is long overdue, and we

are in most urgent need of the stern post, and also connecting rods, and crank slabs. You owe us three connecting rods, and six slabs, and we are most seriously inconvenienced in our work, by lack of this material. In regard to the slabs, by the way, can you not finish them 6⅜ thick instead of 6 9-16 as with the six first sent. Most important of all, however, send them along in some shape. In connection with the connecting rod forgings, I wish to ask if there was not included with the main rod, the forgings for the lower cap. None of those have been sent. Our time is getting very short, on these things, and I am trying to hurry matters along as rapidly as possible. Please help us out all you can.

Very truly yours, W. F. DURAND.

PORT HURON, MICH., *March* 3, 1903.

Delaney Forge & Iron Co., Buffalo.

GENTLEMEN: Will you please name us your best price on forgings as shown on accompanying drawings. Of the stern frame, and the rudder frame, there are to be two each. The number of 87 the other forgings required as on blue print. Steel to be of the standard quality usually employed for such purposes in marine practice on the great lakes. The same to be delivered at St. Clair, Mich. Also tell us when delivery could be made.

Yours truly, COLUMBIA IRON WORKS.

There is a memorandum in pencil there.

Mr. KREMER: We do not care about it.

PORT HURON, MICH., *March* 12, 1903.

Delaney Forge & Iron Co., Buffalo, N. Y.

GENTLEMEN: In accordance iwth your proposition of March 12th, we will ask you to enter our order for shipment to St. Clair, Mich., for engine and hull forgings, as per blue print accompanying. It is understood that work on these forgings should be commenced immediately and that they be gotten out as soon as possible.

Very truly yours, COLUMBIA IRON WORKS.
F. D. JENKS, *Secretary.*

Memorandum in red ink, "Boats No. 4 and 5."

ST. CLAIR, MICH., *March* 19, 1903.

Messrs. Delaney Forge & Iron Co., Buffalo, N. Y.

GENTLEMEN: Enclosed find blue print for stem forgings for ships Nos. 4 and 5. We desire two stems made, one for each boat, dimensions the same as shown on print, and one of them must arrive here, not later than April 5th. It will be impossible for us to wait any longer than the above specified date, for the first one. Kindly let us hear from you at once in regard to this matter.

Very truly, COLUMBIA IRON WORKS.
HENRY RICE, *Gen. Sup't.*

Memorandum, "Boats 4 and 5."

88 ST. CLAIR, *March* 24, 1903.

Messrs. Delaney Forge & Iron Co., Buffalo, N. Y.

GENTLEMEN: On the print for connecting rods forgings for engines 1 and 3, that was sent you, a sketch of the bottom slab was in one corner. Enclosed is a similar sketch of said slab. If six of these slabs have not already been ordered, please forge and send them with the second set of connecting rods. This second set being for ship No. 3. Whether or not you have been lately instructed about forging these slabs, is not definitely known at this office to-day.

Yours truly,

COLUMBIA IRON WORKS.
HENRY RICE, *Gen. Sup't.*

Memorandum, "Boats 1 and 3."

ST. CLAIR, MICH., *March* 24, 1903.

Messrs. Delaney Forge & Iron Co., Buffalo, N. Y.

GENTLEMEN: Enclosed please find blue print for forgings for engine- No. 1 and 3, which we desire you to forge and ship to us immediately. We would be glad to hear from you in regard to forgings previously ordered, and also at what date, we may expect forgings per the enclosed print. It is imperative that we receive them in a short time.

Thanking you for the favor of a reply, we are,

Respectfully yours,

COLUMBIA IRON WORKS.
HENRY RICE, *Gen. Sup't.*

Memorandum in red ink: "Three valve stems, Boat No. 1; three valve stems, Boat No. 3; three cross heads, Boat No. 3; one reverse lever, Boat No. 3."

89 ST. CLAIR, MICH., *March* 30, 1903.

Messrs. Delaney Forge & Iron Co., Buffalo, N. Y.

GENTLEMEN: What is the earliest possible date we may expect tiller and quadrant for ship No. 1, and also the same for ship No. 3? When will you make shipment of the rudder for ship No. 3, and also stem for ship No. 4? We are now at a stand still on numbers 3 and 4 and as the date of the launching of No. 3 is set, we must have the rudder this week, if possible, and would be pleased to have you write us, as we must know. Thanking you for the favor of the reply, we are,

Very truly yours.

COLUMBIA IRON WORKS.
HENRY RICE, *Gen. Sup't.*

PORT HURON, MICH., *April* 13, 1903.

Delaney Forge & Iron Co., Buffalo, N. Y.

GENTLEMEN: Referring to your invoice of March 26th, and also bill of lading of the 27th covering consignment of one rudder frame, and six S crank webs, we would advise we are not yet in receipt of these forgings. The delay is a very serious one to us, as we had anticipated the shipment would reach us in good time. We would beg you to follow the above with a vigorous tracer and employ every means available to have delivery effected at once.

Very truly,

COLUMBIA IRON WORKS.

ST. CLAIR, MICH., *April* 16, 1903.

Messrs. Delaney Forge & Iron Co., Buffalo, N. Y.

GENTLEMEN: We wrote you some time ago in regard to tiller and quadrant for ship No. 1, and to date, you have not favored us
90 with a reply. This boat is now all ready with the exception of the parts mentioned, and it is now imperative that we receive them at once. Kindly write us by return mail and let us know how soon we will receive them. Thanking you for prompt attention to this matter, we are,

Yours very truly,

COLUMBIA IRON WORKS.
HENRY RICE, *Gen. Sup't.*

ST. CLAIR, MICH., *May* 4, 1903.

The Delaney Forge & Iron Co., Buffalo, N. Y.

GENTLEMEN: At various dates we have mailed you blue prints of which you have not as yet so much as acknowledged the receipt nor have you forwarded the forgings outlined thereon. In particular we would refer you to the following prints: Valve stems for engines number- 1 and 3; cross heads for the same; stems for ships 4 and 5; also quadrant and tiller for ship No. 1. In regard to our engines for ships 1 and 3, I might say they are complete as far as possible, and nothing more can be accomplished until the valve stems and cross heads arrive. We have had to lay off part of our machine shop force in consequence of not having them. We are also badly in need for the bottom slabs, for connecting rods, of engine No. 3. Of equal importance to us at the present time are the quadrant and tiller for ship No. 1. The time has now come when we must insist on having them, and that you do your utmost to furnish us with them with all possible dispatch. Last but not least, we require the stems for numbers 4 and 5. We trust at this time you will favor us with an approximate statement of the earliest date the herein mentioned several forgings will leave your plant for St. Clair.

91 Thanking you in anticipation of the favor of a reply, we are,

Very truly yours,

COLUMBIA IRON WORKS.
HENRY RICE, *Gen. Sup't.*

ST. CLAIR, MICH., *May* 27, 1903.

Delaney Forge & Iron Co., Buffalo, N. Y.

GENTLEMEN: Our ships are now ready for stern posts for ships 4 and 5; I wish you would answer immediately, notifying us as to the very earliest date we may expect them.

Yours very truly,

COLUMBIA IRON WORKS.
HENRY RICE, *Gen. Sup't.*

PORT HURON, MICH., *June* 16, 1903.

Delaney Forge & Iron Co., Buffalo, N. Y.

GENTLEMEN: Your favor of June 15th enclosing statement of your account. The two steamers we have had in construction, have been delayed in completion some time beyond our expectation, and as the major part of our payments are tied up until the vessels are completed, it makes us a little hard up for ready funds. We expect to finish one boat the second week in July, and the other one, the second week in August and would ask that you carry our account for us for a short time. We will probably be able to make you some remittances on it this month and if possible will do so.

Yours very truly,

COLUMBIA IRON WORKS,
By C. O. DUNCAN, *Treasurer.*

92 PORT HURON, MICH., *June* 23, 1903.

Delaney Forge & Iron Co., Buffalo, N. Y.

GENTLEMEN: Your favor of June 18th; we are enclosing you our 60-day note for $5,000 with interest at 6 per cent. We trust that this amount will help you out; the balance of your account we will endeavor to take care within the period.

Very truly,

COLUMBIA IRON CO.,
By C. O. DUNCAN, *Treasurer.*

ST. CLAIR, MICH., *June* 24, 1903.

Delaney Forge & Iron Co., Buffalo.

GENTLEMEN: There is still due us on orders placed with you some time ago tiller for our boat No. 1, and the stern post for boat No. 4. We have been expecting the arrival of these every day, and have been somewhat disappointed, that they have not put in appearance. The absence of these two forgings seriously interfered with the carrying of our work along this particular line, and in view of that fact, we would beg and ask you to see to it that shipment is made at once of the above. Thanking you in advance for prompt attention to the matter, we beg to remain,

Yours truly,

COLUMBIA IRON WORKS.

ST. CLAIR, MICH., *June 25th*, 1903.

Delaney Forge & Iron Co., Buffalo.

GENTLEMEN: In connection with our letter of yesterday we also beg to ask you how soon shipment will be made of the remainder of the slabs for crank shaft for engine No. 4, order for which was placed with you a considerable time ago. We have gotten to
93 the point, when we are where we are ready to use this, and we beg to ask you to do what you can to have same sent forward at a very early period. Kindly follow shipment of same with vigorous tracer, so that no delay in transit may be experienced.

Very truly yours,

COLUMBIA IRON WORKS.

That completes the reading of the letters.

Adjourned.

2 P. M.

Mr. ROBBINS recalled.

By Mr. OAKES:

Q. I believe it appears already in testimony that you made several visits to the yard of the Columbia Iron Works, during the building of the Winnebago; how many such visits did you make?

A. Probably four or five; once when her keel was about laid down, and a few side plates on her, and three or four times during the course of construction.

Q. What did you do during those various trips; what did you go there for?

A. I went to the yard to see if I could get more orders, and look over prints, and see if somebody was getting in on the ground, too, and making forgings; but I found that there was no class of work of the kind we furnished around in the place, and I also made inquiries among some of the heads of the yard, and they told me none were being furnished except those being furnished by our people.

Q. State whether or not you saw any of your own forgings there?

A. I did.

Q. Mr. Robbins, something was said on your cross-examination about some of the parts furnished by your company, not arriving in time for use; do you know anything about that?

94 A. I do not know, Mr. Oakes; we never received any notice from the Columbia people that our forgings had not arrived in time.

Q. That is all.

Mr. OAKES: Mr. Kremer, have you the notice of lien served upon you?

Mr. GRAY: Yes, sir, that service is admitted in the answer, as alleged in your bill.

Mr. OAKES: The following notices are handed me on notice to produce. I will offer them in evidence, and read them into the record.

Papers marked Exhibits "11" and "12."
Exhibit "11," addressed to

Mr. Thomas J. Prindeville, Agent for owner of Steamer Winnebago, Sherman St., Chicago, Ills.

DEAR SIR: You will please take notice that the following liens are claimed against the steamer Winnebago recently built in the yards of the Columbia Iron Works, at St. Clair, Michigan, for materials furnished in and about the building, fitting, furnishing, and equipping of said boat and not paid for, as follows:

Delaney Forge & Iron Co., of Buffalo, N. Y., for forgings, etc., $2,100. H. D. Edwards & Co., of Detroit, Michigan, for windlass and general ship chandlers' supplies, $2,000.

Dated August 25, 1903.

DE LANEY FORGE & IRON CO.,
H. D. EDWARDS & CO.,
By SHAW, WARREN, CADY & OAKES,
Proctors, 904 Union Trust Co. Building.

Exhibit "12" is a copy of Exhibit "11," except for the address, Messrs. Prindeville & Co., instead of Thomas J. Prindeville. These notices were handed by the counsel upon the other side, upon notice to produce, and served upon that date specified August 25, 1903.

95 THOMAS J. MORAN, sworn for plaintiff.

Examined by Mr. OAKES:

Q. What is your business?
A. Sailing.
Q. You are the master of the steamer Winnebago, are you?
A. I was last season.
Q. Sailed her in 1903?
A. Yes, sir.
Q. A part owner in her, are you?
A. Yes, sir.
Q. You haven't your log with you, I suppose?
A. No, sir.
Q. Did your vessel load at the port of Marquette, or unload at the port of Marquette last season after she went into commission?
A. She loaded there once.
Q. And where did she trade, aside from that particular trip; how many trips did she make, if you can give us the number?
A. About seven.
Q. She went into commission at what time?
A. July; we left the yard on the 18th or 19th, I think.
Q. And went from there to what place?
A. To Lorain.
Q. Loaded with coal?
A. Railroad iron.
Q. Where did you stop on your way up?
A. St. Clair.
Q. And laid there several days, did you?

A. Well, only two days.
Q. And where did you go with that cargo of railroad iron?
A. Superior, West Superior.
96 Q. On what trip did you take the Marquette load, that same trip down?
A. No, sir, it was about the third or fourth trip.
Q. Did you go to Portage last season with the Winnebago?
A. Yes, sir.
Q. With what?
A. With coal; well, not Portage, we went to Lake Linden.
Q. In the Portage canal; what other Michigan ports did you stop at during the season for loads, or leave a cargo?
A. None.
Q. Now, in your regular trade, you ran from Lorain up to Lake Superior?
A. Tonawanda and Lorain up to Superior.
Q. Passed through Lake Erie, up through the Detroit River, and through Grosse Pointe cut, out here in Lake St. Clair?
A. Yes, sir.
Q. Right up through Lake St. Clair, St. Clair River, Lake Huron, and up through the Detour passage?
A. Yes, sir.
Q. And the new channel through the St. Mary's River?
A. Yes, sir.
Q. Through the Hay Lake channel?
A. Yes, sir.
Q. And right on up through Lake Superior?
A. Yes, sir.
Q. To what port?
A. West Superior.
Q. That was the regular trip that you made, aside from the Marquette and the Portage trips that you have spoken of?
A. Yes, sir.
97 Q. I guess that is all.

Cross-examination:

Q. How large a craft is the Winnebago?
A. Well, she is 1,091 gross tons.
Q. What is she built of?
A. Steel.
Q. And where is Tonawanda, in what State?
A. In New York.
Q. And West Superior?
A. Minnesota—no, Wisconsin.
Q. Lorain is in what State?
A. Ohio.
Mr. CADY: We will concede that.
Q. Give me the dimensions of the Winnebago.
A. She had a 200 foot keel, 39 foot beam and 16 feet molded depth.
Q. Propelled by steam?
A. Yes, sir.

Q. I will ask you whether she was enrolled, and licensed by the U. S. Government?

A. Yes, sir.

Q. And during that time you were sailing her as master?

A. Yes, sir.

Q. Under a license of the United States Government?

A. Yes, sir.

Q. That is all.

Mr. OAKES: I wish to offer in evidence a certified copy of the certificate of enrollment and license of the steamer Winnebago taken out of the port of Port Huron.

Received under objection.

Papers marked Exhibits "13" and "14."

I wish to also offer in evidence, the bill of sale of the steamer Winnebago, from the Columbia Iron Works, of Port Huron,
98 Mich., to the Iroquois Transportation Co., of Michigan City, Ind., dated on the 18th of July. 1903.

Paper marked Exhibit "15."

I will read the first part of the bill of sale into the record; the larger part is a copy of the enrollment.

UNITED STATES OF AMERICA:

Bill of Sale of Enrolled Vessel.

To all to whom these presents shall come, Greeting:

Know ye, that the Columbia Iron Works of Port Huron, Mich., sole owner of the steamer or vessel called the Winnebago, of the burden of 1,091 tons, or thereabouts, have in consideration of the sum of $1 and other valuable consideration of the United States of America, to it in hand paid, before the sealing and delivery of these presents, by the Iroquois Transportation Co. of Michigan City, Ind., the receipt whereof it does hereby acknowledge and is therewith fully satisfied, contented and paid, have bargained and sold, and by these presents do bargain and sell unto the said Iroquois Transportation Company, its assigns, the whole of the said steamer of whatsoever nature, together with the whole of the masts, bowsprit, sails, boats, anchors, cable, tackle, furnishings, and all other things thereunto pertaining, and belonging, the certificate of the enrollment of which said steamer is as follows, viz: And then follows a copy of the enrollment as introduced. Continuing after the copy of the enrollment: To have and to hold the said steamer, and appurtenances thereunto belonging, unto the said Iroquois Transportation Co., and its assigns, the sole and only proper use, benefit and behoof of it, the said Iroquois Transportation Co., and its assigns forever, and it, the said Columbia Iron Works, has and by these presents does promise, covenant and agree for itself and its assigns, to and with the said Iroquois Transportation Co., and its assigns,
99 to warrant and defend the said steamer and all the other before mentioned appurtenances, against all and every person and persons whomsoever.

In testimony whereof, the said Columbia Iron Works has hereunto set its seal this 18th day of July in the year of our Lord, 1903.

COLUMBIA IRON WORKS,
By J. E. BOTSFORD, *President.*
C. O. DUNCAN, *Secretary.*

In the presence of P. H. Phillips and C. E. Kremer, with the ordinary justification clause on the back.

I also offer in evidence a copy of the contract and agreement for the building of the ship, entered into on the 8th day of March, 1902, marked Exhibit "16." Including the assignment of the contract at the foot of the contract.

Mr. OAKES: Can it be conceded that without the introduction of the government charts, that in navigating her from Lake Huron to Lake Erie, through the St. Clair cut, that the vessel would necessarily be in American waters, part of the trip?

Mr. KREMER: Well, I do not like to concede that, but I will concede this much—of course you might have asked the captain on the stand if he navigated in American waters.

COURT: Put him back.

Mr. CADY: I do not know why we should dodge the issues; what we mean here as American are Michigan waters.

Mr. KREMER: I cannot concede that he navigated, without he calls him.

Mr. MORAN, recalled, by Mr. Oakes:

Q. In the course of your trips up and down the lakes, did you navigate in American waters, in the course of your voyage?

A. Why, at times we did; yes, sir.

100 COURT: Did you come through the waters from Lake Erie up to Detroit, on up to St. Clair, on the American side, or in any part of it?

Q. Well, no, sir.

COURT: You took the Canadian side?

A. We touched in American waters.

Q. Where?

A. Right down at Fighting Island, and Grosse Pointe.

Q. And through the American Channel, up there at the St. Clair Flats?

A. Oh, no, you can keep in the Canadian water all the way up there.

Mr. GRAY: The St. Clair Flats is in Canadian water.

COURT: The government built it; Chandler got the bill through; the government built it originally.

Mr. CADY: There is a dispute upon this. But there is no question but what after he leaves Port Huron that there is no moment after they are five miles outside of Port Huron they are not in Michigan waters.

COURT: Are they?

A. I could not say; we steered the usual course.

Q. When you come up to St. Clair you are in Michigan waters?

A. Yes, sir.
Q. When you go to Superior, what waters, or Duluth?
A. Right in American waters.
Q. How far do you clear Keweenaw Point?
A. We can clear it 15 miles, or two or three miles.
Q. Did you go through the Portage Canal?
A. I did once.
Q. And then you sailed in American waters?
A. I went in and unloaded, in Lake Linden once.

Mr. OAKES: Mr. Moran, if I may explain, the captain's course; how far were you off Sand Beach on your usual course up and down?

101 A. About five miles.
Q. How far off Thunder Bay Island?
A. Four or five miles.
Q. That is all.

Plaintiff rests.

FRANK B. JENKS, sworn for defendant, examined by Mr. Kremer:

Q. Where do you reside?
A. Port Huron.
Q. In 1902 and 1903 what corporation were you connected with as an officer?
A. The Columbia Iron Works.
Q. In what capacity?
A. In the earlier part of the time as secretary and in the latter part as vice-president.
Q. Do you remember the construction of a steel steamer, subsequenty called the Winnebago?
A. Yes, sir.
Q. She was constructed where?
A. At the yards of the company just below St. Clair, on the St. Clair river.
Q. State of Michigan?
A. State of Michigan.
Q. Do you remember of the fact of the payments that were made for that steamer?
A. Well, I do not remember the details of it; I know payments were made.
Q. In accordance with the terms of the contract?
A. Yes, sir.
Q. The contract referred to being the one offered in evidence, marked Exhibit 16?
A. Yes, sir.
Q. Now when was the final payment for that steamer made?

102 Mr. CADY: I object to that as immaterial under the statute. It makes no difference when or how or in what method, or to what extent the people who ultimately took title to this floating property may have paid for it, in accordance with the contract or otherwise and the people who constructed it, and who under the law

owned it until they turned it over; the statute gives them the lien upon the property.

COURT: Assuming it does, in a chancery hearing, or in this class of cases, the wiser course is to take the testimony, because in case somebody else should then hear it, the higher court, it may then be reviewed.

Mr. CADY: I have no objection to that, only simply preserving our rights.

COURT: I think that is proper.

Mr. CADY: I understand the practice is, we have to ask for an exception.

COURT: Yes, sir; note an exception, go on.

Question repeated.

A. Made just previous.

Q. I hand you a paper now and ask you whether that will refresh your recollection?

A. Yes, sir, I am familiar with this paper.

Q. What date was the final payment made?

A. July 19th.

Q. Do you recognize the paper now in your hands as having been given by the Columbia Iron Works?

A. Yes, sir.

We will offer that in evidence.

Mr. CADY: I object to the admission, on the same ground.

Same ruling, note an exception.

Paper marked Exhibit 17.

Q. I will ask you what other paper was delivered at that
103 time besides the paper offered in evidence, and the bill of sale that has just been offered in evidence by the plaintiff?

A. I remember this paper.

Paper marked Exhibit 18.

Mr. CADY: These are dated simultaneously.

Same objection, ruling and exception.

EXHIBIT 17.

PORT HURON, *July* 19, 1903.

Received from Iroquois Transportation Co., four thousand dollars ($4,000), the same being final cash payment of steamer Winnebago.

COLUMBIA IRON WORKS,
By C. O. DUNCAN, *Treasurer.*

EXHIBIT 18.

PORT HURON, MICH., *July* 18, 1903.

Whereas, on the 18th day of March, 1902, a contract was entered into between the Columbia Iron Works, and Thomas J. Prindeville, of Chicago, for the construction of the steamer now known as the steamer Winnebago, and,

Whereas, the said contract was assigned to the said Iroquois Transportation Co., and

Whereas, the said Iroquois Transportation Co. is desirous of obtaining immediate possession of said steamer in her incomplete condition now, it is hereby agreed, that the possession may be taken of the said vessel, by the said Iroquois Transporattion Co., on the 19th day of July, 1903, for the purpose of completing and finishing up those things still remaining undone upon said steamer, and
104 required to be done, and performed by said Iron Works, under the terms of the contract for the construction of said steamer. Such work to be proceeded with as expeditiously as possible, and when so completed the acceptance of said steamer by the said Iroquois Transportation Co. is to be considered as final. It being the sole intent and purpose of this agreement to enable the Iroquois Transportation Co. to obtain immediate possession of this steamer, and without intending either to limit the extent of the obligation of said Columbian Iron Works under the original specifications. The risk sustained by the possession and operation of said steamer to be assumed by the said Iroquois Transportation Co., with like effect as though the contract was fully completed.

COLUMBIA IRON WORKS,
By F. B. JENKS, *V. Pres.*

Attest:
C. O. DUNCAN, *Secretary.*

IROQUOIS TRANSPORTATION CO.,
By E. C. KREMER, *President.*

Attest:
THOMAS J. PRINDEVILLE, *Secretary.*

Q. What did the final payment consist of besides money?
A. Bonds.
Q. Do you remember the amount?
A. $48,000.
Q. When were they delivered?
A. It might have been the day before.
Q. About the 19th of July?
A. Yes, sir.
Q. At that time was there any other account from the Iron Works to the Iroquois Transportation Co.?
A. No, sir.
Q. Do you know anything about the material and forgings furnished by the Delaney Forge & Iron Co.?
105 A. Yes, sir.
Q. Was there at any time any conversation, any conference the subject of which was a lien upon the vessel?
A. No, sir.
Q. Do you remember the sending of a note of $5,000 to the Delaney Forge Co.?
A. Not personally; Mr. Duncan was the treasurer, and sent a note; I knew of it in general way, but not particularly.

Q. Did you from time to time receive statements of account from the Delaney Forge & Iron Co.?
A. Yes, sir.
Q. Do you remember the amount in this statement?
A. No, sir.

Objected to; the statements themselves ought to show.
COURT: He says he does not remember; that cuts it off.

Q. I will ask you to look at these letters, and see whether these are the Delaney Forge Co. letters received by the Columbia Iron Works?
A. Yes, sir.

Paper marked "Exhibit 19."

BUFFALO, N. Y., *June 4th*, 1903.

Columbia Iron Works, Port Huron, Mich.

GENTLEMEN: Enclosed herewith we hand you statement of your account to the first inst., showing a balance of $7,656.10 due us. We therefore ask, inasmuch as we are in need of funds with which to meet several heavy obligations, that you kindly remit us check as soon as possible. Trusting you will find it convenient to do so, and assuring you we will appreciate the favor, we remain,

Yours Very truly,

DELANEY FORGE & IRON CO.,
WM. A. ROBBINS, *Secretary*.

106 Paper marked "Exhibit 20."

BUFFALO, *June* 5, 1903.

Columbia Iron Works, Port Huron, Mich.

GENTLEMEN: We enclose herewith statement of account for $7,656.10, which we recommend to your kind attention.

Yours truly,

DELANEY FORGE & IRON CO.,
By JOHN SLOAT.

Paper marked "Exhibit 21."

JUNE 18, 1903.

Columbia Iron Works, Port Huron, Mich.

GENTLEMEN: Replying to yours under date of 16th inst., we wish to state that we are now swinging several heavy contracts and desire to purchase considerable material. This makes us quite short of funds, so that if you would kindly send us your short note to balance account. This we can use, and will be pleased to have it. With best regards, remain,

Yours very truly,

DELANEY FORGE & IRON CO.,
WM. A. ROBBINS, *Secretary*.

BUFFALO, *June* 27, 1903.

Columbia Iron Works, Port Huron, Mich.

GENTLEMEN: We are today in receipt of your valued favor under date of 23rd inst., enclosing promissory note, at 60 days for $5,000, payable at the Commercial Bank of your city. We have therefore placed the same to your credit, and wish to thank you for your promptness. With best regards, soliciting your further patronage, we remain,

Yours very truly,

DELANEY FORGE & IRON CO.

107 Q. I want to ask you about the bonds that were received; were they negotiable bonds?

A. Yes, sir.

Q. Do you remember the time when the steamer was launched?

A. Yes, sir.

Q. What time was it?

A. March 21st.

Q. And then what name did she have after that?

A. Winnebago.

Q. How was that painted on her, and where?

A. Well it was put on in letters; metal letters on her bow, and the name painted on the stern, and I think on the pilot house, I am pretty sure.

Q. What was there on her stern as the hailing place?

A. Michigan City.

Q. When did she leave there?

A. About July 19th, I think, the same date that we completed the transfer.

Q. I think that is all.

Cross-examination.

By Mr. OAKES:

Q. I show you a ledger here, do you recognize it?

A. Yes, sir.

Q. What is it?

A. That is one of the ledgers of the Columbia Iron Works.

Q. I wish you would turn to the Delaney Forge & Iron Co. account.

A. Have you got it already marked?

Q. I had it.

Mr. KREMER: I want to object to the cross-examination. I have not referred to the account, or anything of the kind.

108 Mr. CADY: That is unfortunately not the law in this state.

COURT: By the statute they can use him; they may let him down, and call him back; everything pertaining to the suit.

Mr. CADY: The same as the Massachusetts rule.

Q. I wish you would read the credit under the Delaney Forge &

Iron Co. account, so far as Hull No. 1 is concerned, so far as that ledger shows, read the dates, and the amounts?

A. December 3, $665.60; $45.35; $115.50; $146.83; $536.80; $155.85; and then January 14th after that 1903, although not marked, $94.50; January 21, $92.83; February 7, $157.23; February 28, $507.42; March 14, $155.80, and March 26, $506.83; March 31, $65.00.

Q. Do you find an item farther along there under date of May 30th?

A. It must be in another ledger.

Q. That is as far as this goes?

A. Do you want the debits?

Q. Just show me as to hull No. 1.

A. The debits are not marked as to the hulls.

Q. They are the freight items?

A. It is one cash item, $651.20, and the balance, it says freight on forgings.

Q. From May give us what relates to the Delaney Forge & Iron Co.'s credits on account of hull No. 1.

A. On May 30th it says, Engine 1 and 3, $192.90; I have no means of telling how that was divided; on May 30th, hulls 1 and 3, $139.80; that is in the same situation.

Q. On July 30th do you find an item?

A. I haven't that far. That is July 30th, No. 1, $45, are all the entries here; also quite a number of debits.

Q. I do not care for those; I wish you would turn to ac-
109 count with Hull No. 1, and read the credits of Delaney Forge & Iron Company?

A. The items read just exactly the same; that is from one side to the other; if you want it picked out.

Q. If you can make the statement that hull No. 1, is on your books in each instance charged with the items of Delaney Forge & Iron Co., if you know it is so charged?

A. It is put on the one side hull No. 1, and the other Delaney Forge, and the entry would be the same.

Q. And if it is charged in the Delaney Forge & Iron Co. account where they are credited as for hull No. 1, if you can make that statement without going through the books, then I am content?

A. Yes, sir.

Q. Hull No. 1 on your books is so charged?

A. Yes, sir; except with that item of where it is marked hull 1 and 3, and engine.

Q. How would that be divided?

A. I could not say I am sure; I was going to look; I have no personal knowledge of these books so far as these details are concerned; that item seems to be divided on the ledger here, between the two hulls.

Q. Divided equally?

A. Yes, sir.

Q. That refers to the item of $192.90?

A. Yes, sir; both of these items.

Q. Divided equally between hulls 1 and 3?
A. Well one is engine 1 and 3, and the other hulls.
Q. 1 and 3?
A. Yes, sir; divided in the hull account equally.
Q. Mr. Jenks, was there, at the time you received the final payment on account of this ship, was there any arrangement as to indemnifying the purchasers of the ship?
A. No, sir.
110 Q. You gave them no indemnity bond on account of outstanding claims?
A. Not to me; the other officers were present; I was busy in other matters largely.
Q. The concern, the Columbia Iron Works, on July 31, 1903, made a common law assignment?
A. Yes, sir.
COURT: How near is that to the date of your sale?
A. Well, the sale was on the 19th.
COURT: Of June??
A. July. The 19th of July the sale was made and the assignment on the 31st.
Q. Within 10 or 12 days, or two weeks, before this transfer was made, an arrangement was entered into by which the possession and ownership of the boat could be hurried to them, was it not?
A. No, sir.
Question withdrawn.
Q. When did the ship go into commission if you know?
A. Well, I would say about July 18 or 19th; it was when we gave up possession of her to them by that assignment and these transfers, I think July 18th or 19th.
Q. You do not know when she went into commission?
A. Immediately after this transfer was made, July 19th was it not?
Q. What was done with these bonds, Mr. Jenks, that were taken?
A. Turned over to the Union Trust Co., as they had been sold previously, and the monies anticipated.

Re-direct examination:

Q. Were these bonds secured by mortgage on the steamer?
A. Yes, sir.
Q. Now at the time of this transfer, you have said that
111 there was nothing said about any lien; had you at that time any information from any source that anyone claimed a lien on her?

Objected to as not competent from any point of view; they are supposed to know the law of the situation; it was their own business to tell; they knew they were in debt.

COURT: Let him answer; what is the whole boat or vessel worth?
A. $95,000.
Q. $48,000 in bonds?
A. Yes, sir.
Q. And the rest in money from time to time, or its equivalent?

A. Yes, sir.
Q. Money before this $48,000?
A. Yes, sir; some paid at the time of the signing of the contract.
Mr. KREMER: I asked him a question. Had the note matured at that time?
A. Yes, sir.
Q. Will you turn to the account of the Delaney Forge & Iron Co. on the ledger on page 62, and state what the last credits are, or the last items charged to the Delaney Forge & Iron Co. are on the books of the Columbia Iron Works?

Objected to, they cannot make testimony in their favor, by their own books.

COURT: Nor in your favor; a man can support his statement by his books; he can show that it was entered at the time; he has not the detail in memory, and then it is allowed in; especially in a hearing like this.

Mr. KREMER: They have gone into the books on one side, and we ought to show the other.

112 Note an exception.

A. June 23, 1903, $5,000; July 10, $32.26.
Q. Did you read the item of $5,000?
COURT: What does it say?
Q. What is the descriptive part?
A. Bills payable 60 day note; and the July 10th item is freight on forgings.
Q. The $32.36 item means $32.36?
A. Yes, sir.

Mr. CADY: I want my objection on this ground, first, that the entries that he makes, or that are made on a man's own books, are inadmissible, in his favor; they are only admitted when they are evidence against him.

COURT: It is not necessary to rule on that, they are in; I may say this, they are not conclusive evidence against the opposite party; neither would these be the other way; it has a bearing.

Mr. GRAY: Mr. Jenks, looking at the first ledger that was shown you at page 244, the account of the Delaney Forge & Iron Co., are there any other charges on the other side of the ledger?
A. Yes, sir.
Q. What are the total charges?
A. The total charges are $764.67.
Q. That is they consist in the main of one item?
A. The largest item is January 12th by cash, $651.20.
Q. What do the other items consist of?
A. The balance consisting of $113.47 is freight on forgings.

Re-cross examination:

By Mr. OAKES:

Q. That receipt that was handed you, Exhibit "17," I see that refers to the passing of $4,000; was that all in money, Mr. Jenks?

A. No, sir.

113 Q. Just state what it was?

A. The amount of money was—$3,500 of that was a penalty under the contract for the non-completion of the boat.

Q. That reduced the $4,000 item down to $500.

A. Some little allowance, I do not know what now.

Mr. KREMER: Interest on bonds.

A. So that the amount that actually passed at that time was some $200 or $300.

Q. That is instead of $4,000.

A. Yes, sir.

Q. How much money did you actually get on that contract, Mr. Jenks?

A. Well. it would be the difference between.

Q. Between $95,000 and $3,500 penalty and interest; the contract price was $95,000?

A. Yes, sir.

Q. Do you know what the cost of that ship was?

Mr. KREMER: I object to that.

A. No, sir.

COURT: The answer covers it. He does not know.

Q. Do you know how the bid of the Columbia Iron Works compared with the bids of other builders for that ship?

Objected to.

COURT: If he knows.

Q. Do you know?

A. No, sir.

Q. You do not know what other yards bid on that ship?

A. No, sir; I do not.

COURT: That cuts off any exception any way.

Q. Who was to pay for the men who would be left on the ship to complete her, after she left your yards.

114 A. It was provided for in that paper; only two or three men, a few little odds and ends, a little painting.

Q. Find the arrangement as to the payment?

Witness reads from contract.

Q. That is all.

Capt. MORAN, recalled by Mr. Kremer.

Mr. CADY: You are making him your witness?

Mr. KREMER: It does not make any difference in Michigan.

COURT: Either party can make him their witness.

Q. In 1903, you were the master of the steamer Winnebago?

A. Yes, sir.

Q. Do you remember of leaving St. Clair, or the shipyard with the Winnebago?

A. Yes, sir.

Q. What day was that?

A. On either the 18th or 19th of July.

Q. And when next did you go to St. Clair with that steamer?
A. About the 24th or 25th.
Q. At that time what, if anything, did you receive from that shipyard there from the Columbia Iron Works?
A. We got a spare tiller, when we came back there.
Q. And when you left St. Clair did you or did you not have a spare tiller?
A. We had one that the yard made there for us.
Q. Was that a temporory one, or a permanent one?
A. A temporary one.
Q. And then what day was it, that you took on the permanent one?
A. I should say it would be about the 25th of July as near as I can remember.
Q. That was of the regular form used?
115 A. Yes, sir.
Q. Did you at any time order anything from the Delaney Forge & Iron Co.?
A. No, sir.
Q. Did you ever have any conversation with the representative of that company?
A. No, sir.
Q. How long were you about the vessel there before you left on the 19th of July, 1903?
A. I was there from Christmas on until that time.
Q. What were you doing there?
A. Looking after the building of the boat.
Q. In whose employ were you at that time?
A. The Iroquois Transportation Co.
Q. Was there any other employee of the Iroquois Transportation Co. there at that time, or any portion of it?
A. Yes, sir.
Q. Who?
A. The engineer, Otto.
Q. What time was he there?
A. He came there the 2nd day of March.
Q. What was he doing there?
A. Looking after the building of the engine.
Q. And was there any other; when did you ship your crew for the steamer, what day?
A. Well, they went to work about two days before we left there.
Q. About the 17th?
A. Yes, sir.
Q. Do you know whether at that time the vessel was chartered for the voyage?

Objected to as immaterial.
COURT: Yes or no?

116 A. Yes, sir; I do.
Q. For what voyage was she chartered for?
A. For railroad iron.
Q. From where to where?

A. From Lorain to Superior.
Q. Was the Winnebago built for any special trade or business?
A. Yes, sir.
Q. What business was that?
A. Carrying iron, railroad iron.
Q. And between what points?
A. Between Lake Erie.
Q. What ports in Lake Erie?
A. Conneaut, Lorain, to Port William in Canada, or Superior, or South Chicago to Superior, or Port William.
Q. What were the special features which fitted her for that trade especially?
A. They built her hatches larger than ordinary boats, so as to get the rails in and out and arranged her especially so that she was fitted for that purpose.
Q. In her holds was she made especially for that purpose?
A. No, sir; only about the right length for a certain number of lengths of rails.
Q. Any of those ports on Lake Michigan?
A. No, sir.
Q. Any ports on Superior in Michigan?
A. No, sir.
Q. Any ports on Lake Michigan in Michigan?
A. No, sir.
Q. Do you know of your own knowledge from where the different materials and things came from that went into the construction of the boat?
A. No, sir.

117 Mr. JENKS, recalled by Mr. Oakes:

Q. Do you know of the ordering by your company of the forgings referred to in the testimony here today from the Delaney Forge & Iron Co., do you know whether they were received from that company, by the Columbia Iron Works?
A. I presume they all were, but I know from my knowledge, quite a number of them were, and I know in a general way that the others were.
Q. State whether or not they were used in the construction of the Winnebago?
A. Well, quite a number of them, I saw personally go into the construction, but the others I did not.
Q. You did not see personally go into it?
A. No, sir.
Q. You did not order any others of that kind from any forge institution?
A. No, sir; all the forgings, except some smaller ones we made ourselves.
Mr. KREMER: Did you not order some forgings from Jones & Laughlin?
A. No, sir; that refers to the stems; we succeeded in getting from them some specially rolled iron that was of the right size.

Q. So that you did not have to forge it?
A. No, sir.
Q. The engines were built by the Columbia Iron Works?
A. Yes, sir.
Q. And right upon the ground there?
A. Yes, sir.

Capt MORAN recalled.

Re-cross:

Q. This temporary tiller you used for a few days was made at the yard there?
118 A. Yes, sir.
Q. How do you know that?
A. I saw it made there.
Q. This permanent one you got a few days later it was not made at the yard, I take it?
A. I do not think so.
Q. Do you know where it was made?
A. No, sir.
Q. How did you come to take a temporary tiller?
A. They said our tiller was not made yet.
Q. They had ordered it, but it had not arrived?
A. Well, I presume so.
Q. Did they say it would be there in a day or two when you came up from Lorain?
A. They seemed to think it would be there, but I do not know about that.
Q. You do not know from whom it was ordered?
A. No, sir.
Q. How large a force of men did the Columbia Iron Works keep on your boat to finish it up?
A. At what time?
Q. When you left the Columbia yards and went below?
A. I cannot say how many there were.
Q. Three or four, or a dozen?
A. I should judge 6 or 7 men.
Q. How long did you keep them; how long were they with you; did they go up the lake with you?
A. No, sir.
Q. Got off at St. Clair on the way back?
A. Yes, sir.
Q. You did not pay them?
A. No, sir.
Q. Do you know whether anybody paid them?
A. I do not know as to that.
119 Q. Were you employed by the Columbia Iron Works at the time?
A. No, sir.
Q. At what time did you arrive at the boat?
A. I went to work the next day or two after Chistmas.

Q. When did you first learn about the financial condition of the Columbia Company?
A. It was after we had made a trip, or a couple of trips.
Q. You did not hear of it until after the assignment took place?
A. No, sir.

Redirect:

Q. I want you to look at plaintiff's Exhibit "3," and look at the spare tiller, whether that is the one you received on the 25th or 26th of July or one like that?
A. That looks much like it.
Mr. OAKES: You said that you knew that the vessel was chartered, how did you know that?
A. I got letters from the manager, Mr. Prindeville.
Q. Did you know anything about the charter without seeing the letters?
A. No, sir.
Q. Then you knew from what somebody told you?
A. I knew from letters from him that she was chartered, and he wanted me to hurry the boat out, and get down there, that he had made a charter for a certain date.
Q. You never saw the charter, and do not know only what he told you?
A. Only what he wrote me.
Mr. KREMER: When you got to Lorain did they tell you?
A. Yes, sir.
Mr. OAKES: You notified them you were coming, did you?
A. Yes, sir.

120 ROY M. VAN VLEET, sworn for defendant.

Examined by Mr. KREMER:

Q. Where do you live?
A. Port Huron, Mich.
Q. In 1902, and up to say the 1st of August, 1903, what was your business?
A. Why, I was employed at the Columbia Iron Works, at St. Clair; I had charge of their electrical department, primarily.
Q. At that time were you familiar with the steamer called the Winnebago?
A. Yes, sir.
Q. And are you familiar with her engines, and the parts that made up her engines?
A. Yes, sir.
Q. I will ask you now what you know about certain valve stems?
Mr. CADY: Are you examining this man as an expert?
Mr. KREMER: He is a man who knows.
Mr. CADY: Technically, as a man who knows about engines?
Mr. KREMER: No, sir, as a fact; whether this man knows whether this engine had a valve stem or not?
Mr. CADY: I do not think he is qualified.

Mr. KREMER: I am assuming that he knows.

Mr. CADY: I object, unless the qualifying questions are asked.

Q. What do you know about the erection of the engines there?

A. My work required me to go through, all through the shops, and be all over the yards; I had charge of a good deal of the construction proper, besides my own work, that was a minor part of my work.

121 Q. What knowledge and experience have you as a mechanic—as an engineer?

A. I am an electrical mechanical engineer, but have taken a course in the Westinghouse plant, known as the student's course, and also been on the Westinghouse Machine Co. engine test force.

Q. Are you familiar with the construction of an engine, such as went into the Winnebago?

A. Yes, sir.

Q. Familiar with that?

A. Yes, sir.

Q. Do you know about certain valve stems that were forged by the Delaney Forge Co. for that engine?

A. I knew this, that the valve stems did not arrive in time, and we forged some, or rather the men in charge of the machine shop had some made in the blacksmith shop.

Q. How many were made there?

A. Two.

Q. Where were they used?

A. On the higher pressure valve, and the intermediate valve.

Q. How many others on that engine?

A. One low pressure valve.

Q. Do you know where that came from?

A. No, sir, I suppose it came from the other forgings?

Q. Do you know what became of two spare valve stems?

A. No, sir.

Q. Or where they were used?

A. No, sir.

Q. I want you to look at plaintiff's Exhibit "6," and see if from that you can point out there from the three valve stems represented on that blue print, which were the ones constructed in the shop of the Columbia Iron Works?

A. The two small ones.

Q. Those on the chart, the two lower ones?

122 A. On the chart, the two lower ones.

COURT: Were they costly?

A. Not so very.

Mr. GRAY: The three are on there listed at about $40 or $38 or $39.

Q. If these three forgings appear to be worth the sum of $40 give me the exact amount?

Mr. GRAY: $38.28.

Q. What, in your judgment, would be the value of the two smaller ones?

Objected to; I do not think the witness is competent to testify as to value.

A. Oh, a little less than two-thirds; the other valve stem is a heavier valve stem; something less than two-thirds.

Q. I think that is all.

Cross-examination.

By Mr. OAKES:

Q. You say you had primarily charge of the electrical department?

A. Yes, sir, I installed the electric plant.

Q. You were not over Mr. Lovejoy in authority there at the yard, were you?

A. No, sir; he had one department, and I the other.

Q. Do you mean to say you had charge in a general sense of the construction work, as Mr. Lovejoy did in the yard?

A. He had no charge of construction work; he had charge of laying down the lines of the boat, and work of that kind, and the molding; mine was electrical work, and several construction propositions around the ship-yard.

Q. More than on the ship itself?

A. Yes, sir.

123 Q. Around on the yard.

Q. During the construction of the boat that required me to be on it.

Q. That would be after the boat was launched, and after her engine was in?

A. No, sir, even before launching we put some in.

Q. When did you put your dynamo in?

A. That goes in when the engine goes in, but commenced wiring before that.

Q. How long before that?

A. Two months before the boat goes into the water and we worked along until she sailed, I went along to see that it went all right.

Q. None of these other forgings were made at the yard?

A. I think some bottom slabs.

Q. What particular duty was it of yours to know of the making of these engine forgings, and the making of them?

A. I was associated with the heads of the department around.

Q. Associated in what way; so that you would have to know every detail?

A. No, sir, not by any manner of means.

Q. How did you know?

A. Well, I saw them cut the steel and make them; it is not usual to forge them when coming from the outside sources.

Q. The majority of them then did come from the outside on orders?

A. Yes, sir.

Q. Do you mean to say anything came into that yard you did not know all about?

A. There were lots of things; I did not make any such statement. I did know.

124 Q. You have been on the Winnebago since she went into commission?

A. I was on the first trip.

Q. Were you down to Lorain?

A. Yes, sir, and back to St. Clair.

Redirect:

Q. You said something about the bottom slabs?

A. Yes, sir.

Q. They were made in the yard?

A. Some were made, I could not say how many.

Q. Will you look at the blue prints that have been offered in evidence here, and pick out what you mean by the slabs that you mean were made or built in the yard?

A. These are crank slabs, they are not bottom slabs.

Q. Will you look at the schedule attached to the complaint in this case, and see if you can find anything in those items that were furnished in the yard?

(Witness examines paper.)

Q. Besides the valve stems.

Mr. OAKES: Do you know with that qualification?

A. No, sir.

Q. There is nothing?

A. Nothing but the valve stems on this list.

Defendant rests.

Mr. A. S. ROBBINS, recalled:

Q. You have heard the testimony about two valve stems being made at the Columbia Iron Works for the Winnebago?

A. Yes, sir.

Q. And some statement made that two or three valve stems furnished by that company did not arrive in time; do you know of the shipment of the three valve stems?

A. Yes, sir.

125 Q. Do you know whether or not any claim was ever made that they did not arrive?

Objected to.

COURT: Do you know, yes or no?

A. No.

Q. Was any claim ever made to that company of their non-arrival?

Objected to as irrelevant and immaterial.

COURT: To your knowledge?

A. No, there was not.

Q. Would you have been in a position to know had any claim been made?

Objected to as irrelevant and immaterial.

COURT: From your position in the company, would a fault finding letter come to you on that subject?

A. Yes, sir.

Q. During that time?

A. Yes, sir.

Q. That is all.

Testimony closed.

It is hereby stipulated by and between the attorneys for the respective parties that:

Exhibit 2 is a shop worn blue print showing plans of tiller for quadrant. Aside from lines and measurements the words "Tiller for Quadrant" and memorandum "2 Thus" are printed on the face. On the back with red pencil is the memo., "Hulls 1 and 3," and with rubber stamp, "Order Received January 15th, 1903."

Exhibit 3 is a shop worn blue print showing plans of "spare tiller." Aside from lines and measurements on face are printed the memo. "Spare Tiller" "S—1," also the memo. "2 Wanted."

Also on the face with rubber stamp, "Columbia Iron Works,
126 April 8, 1903." On the back with red pencile appears "Hull-1 & 3," and with rubber stamp, "Order received May 10, 1903."

Exhibit 4 is a shop worn blue print showing plans of colums for engine. Aside from lines and measurements is printed "Six of This." On the back with red pencil is the memo., "Engs. 1 & 3," and with rubber stamp, "Order Received Jan. 26, 1903."

Exhibit 5 is a shop worn blue print showing plans of rudder frame. Aside from lines and measurements on the face is printed "Columbia Iron Works (S—1—132)—Date June 21, 1902." On the back in rubber stamp with green ink in two places is "Columbia Iron Works, Port Huron, Mich." In red pencil is "Hull—1," and with rubber stamp in red ink the memo., "Order received July 14, 1902."

Exhibit 6 is a shop worn blue print showing the lines and dimensions for three different sized valve stems. The memo. "Engine-Nos. 1 & 2" is printed on the face and two of each size are specified. The words "Columba Iron Works, No. —, Date —," appear with a rubber stamp and in pencil in the date space is written "March 23, '03." On the back in red pencil is written: "Eng. 1 & 3," and with a rubber stamp, "Order received March 31, 1903."

Exhibit 7 is a shop worn blue print showing the plans for connecting rods and caps, six of each being specified. The memo. "Engine- Nos. 1 & 2" is printed on the face as is also "S—1—23.19." The words "Columbia Iron Works, No. —, Date —," put on with a rubber stamp, appear on the face. On the back in red pencil appears "Engs. 1 & 3."

Exhibit 8 is a shopworn blue print of the plans for "pieces for two complete crank shafts." The print calls for two steel
127 pins 22¾ inches long; two 39½ inches long; two 33½ inches long, two shafts 42¾ inches long; six crank pins and

twelve crank webs. On the face with a rubber stamp in two places appears "Columbia Iron Works, No. —, Date —," and in blue pencil in the spaces appears "S—23—6—Nov. 5, 1902." On the back with a rubber stamp appears, "Order received Nov. 10, 1902."

And it is agreed that the originals may be used in the argument on appeal.

GRAY & GRAY, *Attorneys for Claimant.*
SHAW, WARREN, CADY & OAKES,
Attorneys for Complainants.

EXHIBIT 10.

PORT HURON, MICH., *June* 13, 1903.

$52.50 int.
5,000.00

$5,052.50

Sixty (60) days after date, we promise to pay to the order of DeLaney Forge & Iron Company five thousand and no/100 dollars, at The Commercial Bank, Port Huron, Mich.

Value received, with interest at six per cent. per annum.

COLUMBIA IRON WORKS,
By C. O. DUNCAN, *Treas.*

On the back are the following endorsements:

Pay to the order of The People's Bank of Buffalo, N. Y.
DE LANEY FORGE & IRON CO.
JOHN L. SLOTE, *Treasurer.*

128 The following endorsements with rubber stamp also appear on the note, but are marked out with pen:

Pay any Bank,
Banker or Trust Company,
or order.
No. 240015.
The People's Bank,
of Buffalo, N. Y.
G. W. Hammond, Cashier.
Pay to the Order of
Any Bank or Banker,
Aug. 11, 1903.
The People's Savings Bank,
Detroit, Mich.
G. E. Lawson, Cashier.

No reference to protest appears on the note.

EXHIBIT 13.

Permanent
Enrollment No. 6. Official Number.
Numerals. Letters.
81871

Enrollment.

In conformity to Title L, "Regulation of Vessels in Domestic Commerce," of the Revised Statutes of the United States, Charles O. Duncan, of Port Huron, Mich., secretary, having taken and subscribed the oath required by law, and having sworn that the Columbia Iron Works incorporated under the laws of the State of Michigan, the sole owner of the vessel called the Winnebago, of Port Huron, whereof Thomas J. Moran, a citizen of the United States, is master, and that the said vessel was built in the year 1903, at St. Clair, Michi-
129 gan, of steel, as appears by the certificate of the Columbia Iron Works' master carpenter on file, and Wm. R. Chadwick, deputy collector, having certified that the said vessel is a screw steamer; that she has 1 deck, 2 masts; plain head, round stern; that her length is 200 feet, her breadth 39.3 feet, her depth 13.7 feet, her height — feet; that she measures as follows:

		Tons.	100ths.
Capacity under tonnage deck		917	35
Capacity between decks above tonnage deck			
Capacity of inclosures on the upper deck, viz:			
Forecastle 48.86 after enclosure 125.41		174	27
Gross tonnage		1091	
Deductions under Sec. 4153, Revised Statutes, as amended by Act of March 2, 1895:			
Crew space, 30.21; master's cabin	30.21		
Steering gear, 1.63; anchor gear, 8.37; boatswain's stores, 23.27	33.27		
Chart house, —; donkey engine and boiler, Storage of sails, —; propelling power, 241.29	241.29		
Total deductions	304.77	304.27	
Net tonnage		786	

That the following described spaces, and no others, have been omitted, viz: and the said Columbia Iron Works having agreed to the description and admeasurement above specified said vessel has been duly enrolled at the Port of Port Huron.

Given under my hand and seal at the Port of Port Huron, in the

district of Huron, this 18th day of July, in the year one thousand nine hundred three.

[SEAL.] WM. R. CHADWICK,
Dep. Collector of Customs.

130 EXHIBIT "15."

License No. 7. Official Number.
Numerals. Letters.
81,871

THE UNITED STATES OF AMERICA:

License For Enrolled Vessel.

To carry on the Coasting and Foreign Trade on the Northern, Northeastern, and Northwestern Frontier, otherwise than by sea, for one year.

District of Huron, Port of Port Huron.

In pursuance of Title L, "Regulation of Vessels in Domestic Commerce," of the Revised Statutes of the United States, T. J. Moran, Master, and the Columbia Iron Works, owner, agreeing that the screw steamer called the "Winnebago," whereof the said Moran is Master, burden 786 tons and —— hundredths, as appears by her enrollment No. 6, dated Port Huron, July 18, 1903, shall not be employed in any trade, while this License shall continue in force, whereby the Revenue of the United States shall be defrauded; and having also sworn that this License shall not be used for any other vessel, or for any other employment than is herein specified, License is Hereby Granted for the said Screw Steamer called the "Winnebago" to be employed in Domestic and Foreign Trade, for One Year from the date hereof, and no longer.

Given under my hand and seal at the Port of Port Huron, in the District of Huron, this 18th day of July, in the year one thousand nine hundred three.

WM. R. CHADWICK,
Dep. Collector of Customs.

——— ———,
Naval Officer.

I certify this to be a true copy of original record on file in this office. Custom House, Port Huron, Aug. 8th, 1904.

(S'gn'd) WM. R. CHADWICK,
[SEAL.] *Deputy Collector.*

131 EXHIBIT "16."

This Contract and Agreement made and entered into this 8th day of March, A. D. 1902, between the Columbia Iron Works, a corporation organized and doing business under the laws of the State of Michigan, by J. E. Botsford; President, party of the first part, and

John J. Boland, of Buffalo, N. Y., and Thomas J. Prindiville, of Chicago, Illinois, parties of the second part, Witnesseth:

1st. The said party of the first part, in consideration of the payments and agreements and covenants hereinafter set forth to be performed by said parties of the second part, hereby covenants and agrees to and with said parties of the second part that it will furnish all material and labor necessary to completely construct and deliver at Port Huron, Michigan, on or before the first day of October, A. D. 1902, a steel steamer, to be built of the material and dimensions, and in strict accordance with the specifications and drawings, copies of which are attached to this contract, and which form a part thereof.

2. The said party of the first part hereby agrees to furnish the quality of material in the construction of said boat and its equipment required by said plans and specifications, and to do all of the work upon said vessel in a good and workmanlike manner, and to finish said vessel and have her ready for delivery on the date above mentioned; and in the event of the said party of the first part failing to have said vessel completed and ready for delivery, to the parties of the second part at the time above mentioned, said party of the first part hereby agrees to forfeit the sum of fifty ($50.00) dollars per day, as liquidated damages, for each day of delay in its failure so to do, such amount to be retained by said parties of the second part out of the amount to be paid hereunder to the said party of the
132 first part; provided, that the maximum of said per diem forfeiture shall in no event exceed the sum of three thousand five hundred ($3,500.00) dollars.

3. As an inducement for promptness and despatch in the completion of such work, and the delivery of said vessel at a time prior to the said first day of October, 1902, the said parties of the second part in addition to the payments hereinafter specified, do hereby covenant, promise and agree that in the event of the completion of said vessel ready for delivery before said first day of October, 1902, to pay to the said party of the first part the sum of fifty dollars for each and every day remaining between the date of such completion ready for delivery, and the said first day of October, 1902.

4th. It is further understood and agreed between the parties hereto that the said party of the first part shall not be liable for any delay, or for the penalty herein provided for delay, if such delay be occasioned by strikes, or labor disturbances.

5th. For the full completion of said vessel in accordance with the terms of this contract, and the said specifications, the said parties of the second part hereby agree to pay to the said party of the first part the sum of ninety-five thousand dollars as follows: $7,500 at the date of signing of this contract, the receipt whereof is hereby acknowledged by said party of the first part; $7,500 April 3d, 1902; $4,000 April 15th, 1902; $4,000 June 15th, 1902; $4,000 August 15th, 1902; and $4,000 on the final completion of said vessel.

6th. Said parties of the second part also hereby covenant and agree as one of the considerations for this contract, to cause to be formed a corporation under the laws of the State of Indiana, to be known as "The Iroquois Transportation Company," such organization to be

completed before the final completion of said vessel, and to be
133 composed of the following stockholders: J. S. Keefe, George Maroy, Edward Higgins, William Sterling, Charles West, Charles E. Kremer, Thomas J. Prindiville, and John J. Boland, and other parties to be added to said list and on the first day of October, 1902, the said parties of the second part agree to procure and cause to be delivered to the party of the first part two notes to be executed by said corporation and to be indorsed by all of the above named stockholders for the sum of eight thousand dollars each; one payable in one year, and the other in two years from such date, with interest at the rate of six per cent., payable annually; provided, that if said vessel is completed and delivered prior to the said first day of October, such notes shall be executed and delivered at the time of such completion, but shall, however, be dated October first, 1902, and draw interest only from such date.

7th. Said parties of the second part also agree that said corporation shall before the completion of said vessel, take necessary proceedings to cause the bonds of such corporation to be issued in the sum of forty-eight thousand dollars, to be secured by mortgage or trust deed upon the property of the said corporation, such bonds to bear interest at the rate of six per cent., payable annually, and to be payable as follows: Eight thousand dollars in three years from the date of issuance of said bonds, and eight thousand dollars in each and every year thereafter until the full sum of $48,000 has been paid. Such proceedings shall also provide for the insuring of said vessel as additional security on said mortgage, in an amount at least equal to the total amount of such bonds at all times remaining unpaid, in good responsible companies, satisfactory to said party of the first part, insuring said vessel and her equipment against fire and all marine accidents and perils of every nature, and to cause such
insurance policies and bonds to be delivered to said party
134 of the first part, and the trust deed or mortgage to be recorded at the home port of said vessel in accordance with the law; provided, however, that the said parties of the second part or said corporation, may at its option pay to the said party of the first part the said balance of forty-eight thousand dollars at the time of the delivery of said vessel.

In Witness Whereof, the said party of the first part has by its President caused these presents to be executed, and its seal thereto attached, and the said parties of the second part have hereunto set their hands and seals the day and year first above written.

COLUMBIA IRON WORKS,
By J. E. BOTSFORD, *President.*
JOHN J. BOLAND. [L.S.]
THOMAS J. PRINDIVILLE. [L.S.]

In Presence of
W. F. DURAND.
P. H. PHILLIPS.
[SEAL.]

For and in consideration of the sum of fifteen thousand dollars we hereby sell, assign and set over to the Iroquois Transportation Company the above named contract and all rights and property thereunder, the said Iroquois Transportation Company to carry out and perform all of the terms and obligations to be kept and performed by us thereunder.

Dated April 5th, 1902.

JOHN J. BOLAND,
By THOMAS J. PRINDIVILLE,
His Att'y in Fact.
THOMAS J. PRINDIVILLE.

135 *Intervening Complaint.*

STATE OF MICHIGAN:

Circuit Court for the County of Wayne.

DE LANEY FORGE & IRON COMPANY, a Corporation, Complainant,
vs.
STR. "WINNEBAGO," HER ENGINES, ETC.

The intervening complaint of George W. Edwards, Frank W. Eddy and George W. Edwards, executor of the estate of H. D. Edwards, deceased, in the cause of the Delaney Forge & Iron Company, a corporation, against the steamer "Winnebago," her engines, boilers, machinery, boats, tackle, apparel and furniture, alleges as follows:

First. That at all the times herein mentioned said intervening complainants were and now are residents of the City of Detroit, Michigan, and were and are co-partners, doing business under the firm name of H. D. Edwards & Company.

Second. That the said steamer "Winnebago" is a water craft of above five tons burden, used and intended to be used in navigating the waters of this State, and that said steamer is also used and intended to be used upon the Great Lakes and their connecting waters; that the construction of said ship was recently completed at the yards of the Columbia Iron Works, near St. Clair, Michigan. That

136 the work of construction of said ship was done for the Iroquois Transportation Company, as intervening complainants are informed and believe, which said Iroquois Transportation Company, as intervening complainants are informed and believe, is a corporation of the State of Indiana, and is now, through its said contract for construction with said Columbia Iron Works, the owner of said ship; and that, as intervening complainants are informed and believe, the said ship was built by her owners or their agents with the intent and purpose of being so used in navigating said lakes and waters, and that they so intended to use said vessel during all the time she was being built.

Third. That in or about the months of February, March, April, May, June and July, 1903, the said vessel being in the course of

construction as a steam propeller, at or near St. Clair, Michigan, your intervening complainants, at the request of the Columbia Iron Works, the corporation engaged in building said vessel, did furnish certain materials and supplies, in and about the building, fitting, furnishing and equipping said craft as a steam propeller, more particularly set forth in Exhibit "A," hereto attached; and your complainants aver that said materials and supplies were actually used in and about the fitting, furnishing and equipping of said steamer, and that for said materials and supplies said builders agreed, to and with said intervening complainants, to pay said intervening complainants the amount of money stated in the said schedule.

Fourth. That said materials and supplies are reasonably worth the sum of money charged for them in said schedule.

Fifth. That there is now due said intervening complainants for the material and supplies so as aforesaid furnished, the sum of two thousand ($2,000.00) dollars, and interest thereon, and that no part of same has ever been paid.

Sixth. That the said contract for furnishing the materials
137 and supplies aforesaid was made and performed by said intervening complainants, and the said materials and supplies were accepted and used, and intended to be accepted and used, as aforesaid, in the State of Michigan. That at the time of the making of said contract and the furnishing of said materials and supplies, the said vessel, as these intervening complainants are informed and believe, was then upon the land in said State of Michigan, and not in the water, and had never been in the water, and had never been launched; and that at the time of the making of said contract, it was the intent of both said complainant and the parties to whom said materials and supplies were furnished, that a large part of said materials and supplies should be placed in the said vessel before she was removed from the land or launched, or placed in the water; and that at the time the said intervening complainants were furnishing the greater part of said materials and supplies, the said vessel, as intervening complainants are informed and believe, was then upon the land in the State of Michigan, and had never been in the water, and had never been launched; and that a large part of said materials and supplies, as intervening complainants are informed and believe, previous to her being launched, were placed in her and attached to her, while she was yet an uncompleted and unfinished vessel, and while she was upon the land, before she was launched or placed in the water. That intervening complainants further aver that any of said materials and supplies that were not placed in said vessel previous to her being launched have since been placed in her, and attached to her. That at the time of the making of said contract, and at the time the said intervening complainants performed the same by the delivery of said materials and supplies, and at the time the same were so placed in said vessel, the said vessel, as intervening complainants are informed and believe, had not been
138 completed, and, not having been completed, had not been licensed or enrolled under the Acts of Congress.

Seventh. That some time ago, to wit, about August 25th, 1903,

your intervening complainants served notice of their claim of lien against said steamer for the materials and supplies furnished as aforesaid, such notice being served on the Iroquois Transportation Company, who, intervening complainants are informed and believe, was and is the owner of said vessel; and your intervening complainants hereby reassert their right of lien as aforesaid, under the statutes of this State in such case made and provided.

Eighth. That all and singular the premises are true.

Wherefore, your intervening complainants pray that process in due form, according to the course and practice of this court unler the statute in such case made and provided, may issue, directed to the sheriff of said county, commanding him to summon the owner or master of said steamer to answer all and singular the matters aforesaid, and that judgment may be rendered in favor of said intervening complainants for their claim aforesaid; and that the same may be satisfied, and the said intervening complainants' said lien against said steamer may be enforced according to the statute in such case made and provided; and that said intervening complainants may have such further, other or different relief in the premises as the nature of this case may entitle them to.

GEORGE W. EDWARDS,
FRANK W. EDDY, AND
GEORGE W. EDWARDS,
Executor of the Estate of H. D. Edwards, Deceased,
By GEORGE W. EDWARDS.

SHAW, WARREN, CADY & OAKES,
Union Trust Building, Detroit, Mich.,
Attorneys for Intervening Complainants.

139 STATE OF MICHIGAN, *County of Wayne, ss:*

George W. Edwards, being first duly sworn, deposes and says that he is one of the above named intervening complainants; that he has read the foregoing intervening complaint, and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters therein stated to be on information and belief; and as to those matters he believes it to be true.

GEORGE W. EDWARDS.

Subscribed and sworn to before me, this 5th day of October, A. D. 1903.

JOSEPH G. HAMBLIN, JR.
Notary Public, Wayne County, Mich.

My commission expires Jan. 22, '04.

EXHIBIT "A."

Str. "Winnegago," Dr. to H. D. Edwards & Co.

1903.			
Feb. 11th,	1	No. A Providence Steam Capstan Windlass with new locking gear, Iron Side & Rawl bitts, Gypsey ends, and chain stoppers with 6 in. by 8 Inverted Reverse Valve Engines	$975.00
	1	No. D Providence Single Barrel Steam Capstan, with Double 5 x 7 Brass, Link Reversing Engines	410.00
From February to July, 1903, inclusive, general supplies, ship chandlery, stores and furnishings aside from above			615.00
Total			$2,000.00

and interest thereon.

140 *Answer to Intervening Complaint.*

STATE OF MICHIGAN:

To the Circuit Court for the County of Wayne.

DELANEY FORGE & IRON COMPANY, Complainant,
vs.
STEAMER "WINNEBAGO," ETC.

The answer of the Iroquois Transportation Company to the intervening complaint of George W. Edwards, Frank W. Eddy and George W. Edwards, executors of the estate of H. D. Edwards, deceased, in the above cause shows: The Iroquois Transportation Company, saving and reserving to itself all manner of benefit and advantage of exception to the many errors, defects and insufficiencies in said complaint contained, for answer to so much and such parts thereof as it is advised is material and necessary for it to make answer unto, say:

1st. That this claimant is a corporation duly organized and existing under the laws of the State of Indiana, and maintains its principal office at Michigan City, Indiana, and also an agency at Chicago, Illinois, and that it is financially responsible, and at the time of the filing of the intervening complaint herein was the sole owner of the steamer "Winnebago."

2nd. That this claimant has no knowledge as to whether the intervening complainants herein are copartners doing business
141 under the name and style of H. D. Edwards & Company, and therefore demands strict proof of said allegation.

3rd. This claimant admits that the steamer "Winnebago" is a

water craft of above five tons burthen, and that she is used, or intended to be used upon the Great Lakes and their connecting waters, but denies that the said steamer is used or intended to be used in navigating the waters of the State of Michigan. This claimant admits that the said steamer was constructed for it, and that it is a corporation of the State of Indiana, and that it had made a contract for the construction of the said steamer with the Columbia Iron Works, but denies that the said steamer was built with the intent and purpose of being used to navigate the waters of the State of Michigan.

4th. This claimant admits that during the time mentioned in the third article of the intervening complaint the said steamer was in course of construction as a steam propeller at or near St. C'air, Michigan.

Claimant has no knowledge whatever of the furnishing of the materials and supplies which it is alleged were furnished to the said steamer at the request of the Columbia Iron Works.

Claimant has no knowledge as to whether the said materials and supplies were actually used in and about the fitting, finishing and equipping of the said steamer, or whether the said bills for the same were paid. As to these matters claimant demands strict proof.

5th. Claimant has no knowledge as to the value of the said supplies and materials, and therefore, demands strict proof of the same.

6th. Claimant denies that there is due said intervening complainant from the said steamer "Winnebago," or this claimant, the sum of two thousand dollars ($2,000) and interest thereon.

142 7th. Claimant has no knowledge as to whether the contract for the furnishing of the materials and supplies, set up in the intervening complaint, was made or performed, and therefore, demands strict proof thereof.

Claimant has no knowledge as to whether or not the said steamer was in the water or on land at the time the material and supplies, as set up in the intervening complaint, were furnished. Neither has claimant any knowledge as to whether any part of said materials and supplies were placed in said vessel before she was launched, or while she was upon the land, or while she was in the water, and claimant therefore demands strict proof thereof, if the same is material.

8th. This claimant admits that on August 25th, 1903, a notice was served, as set forth in the seventh article of the intervening complaint.

And for a further answer to the said intervening complaint claimant denies each and every other allegation, not hereinbefore specifically admitted to be true, and for a full and complete answer to the intervening complaint alleges:

9th. That on or about the 8th day of March, 1902, the Columbia Iron Works, a corporation organized and doing business under the laws of the State of Michigan, at St. Clair, Michigan, entered into a contract with Thomas J. Prindiville and John J. Boland for the construction and equipment of a steamer to engage in the general freighting business between ports and places on the Great Lakes and the waters connecting the same.

10th. That on or about the 5th day of April, 1902, John J. Bo-

land and Thomas J. Prindiville, for a valuable consideration, sold and assigned to this claimant all their right, title and interest in and to the above named contract, and the said Iroquois Transportation Company thereupon assumed and agreed to perform all of
143 the matters and things to be performed and kept by the said John J. Boland and Thomas J. Prindiville.

11th. That at the time of the making of the said contract, and the assignment thereof, the Columbia Iron Works were engaged in conducting and operating a shipyard for the construction of steel ships at St. Clair, Michigan, and that during all the time the said steamer "Winnebago" was under construction, under the terms of the said contract, the said Columbia Iron Works had the reputation and was considered to be a corporation in good standing, with good credit, and apparently in every way able to carry out and perform its contracts and obligations.

12th. That thereupon the Columbia Iron Works entered upon the construction of said steamer, which was afterwards the "Winnebago," and this respondent, from time to time, made payments on account of the construction of said steamer, as required by the terms of the contract, as follows:

$7,500 at the time of signing the contract.
$7,500 April 3rd, 1902.
$4,000 April 15, 1902.
$4,000 June 15th, 1902.
$4,000 August 15th, 1902.

13th. That on or about the 25th day of September, A. D. 1902, it appearing that the said steamer would not be completed by October 1st, 1903, as agreed in the contract, in lieu of the notes to be given, as provided in the said contract, two notes for $4,000 each, payable to the said Columbia Iron Works, were executed and delivered, due in one and two years respectively, and a further payment of $8,000 was made in cash; that at the same time, in consideration of the delivery of the said notes, and the cash payment, it was understood and agreed that the steamer would be finished not later than April 1st, 1903.

144 14th. That the construction of the said steamer was continued, and she was built and constructed to be of more than 1,000 tons burthen, and was intended to be used in navigating the Great Lakes and waters connecting and emptying into the same, and was not intended to be used to navigate the waters of the State of Michigan.

15th. That the said steamer was launched into the waters of the St. Clair river on or about the 21st day of March, 1903, and subsequently thereto was lying at the shipyard of the Columbia Iron Works, in the St. Clair river at St. Clair, and was there fully finished, equipped and fitted out and made ready for sea, and on the — day of July, 1903, was duly enrolled and licensed as a steam vessel of the United States under the laws thereof, and on the 18th day of July, 1903, was, by the usual bill of sale, conveyed and possession thereof delivered to this claimant, and thereupon this claimant delivered to the Columbia Iron Works 96 bonds of the amount of $500 each, and

a mortgage upon the said steamer securing the same, and also the remainder of the full purchase price, amounting in all to the sum of $95,000, as provided by the terms of the said contract.

16th. That at all times prior to July 18th, 1903, it was a well known fact among people engaged in the ship-building trade and transportation business that the said Columbia Iron Works were building and constructing the said steamer "Winnebago" for this claimant and not for itself, and that these facts were well known to the intervening complainant herein. And this intervening complainant was fully informed that the supplies to be furnished by it were furnished on the order of the Columbia Iron Works and not on the order of this claimant, or its agents or servants, or the master or engineer of the said steamer "Winnebago," and that they were also informed that the said steamer material and labor were
145 furnished for the construction of the said steamer, and were not furnished on account of this claimant, the owner thereof.

17th. That from and after the launching of the said steamer this claimant employed a master and engineer to assist in finishing and fitting out the said steamer, and that from and after the launching of the said steamer both the said master and engineer were constantly on board of the said steamer, a fact well known to the intervening complainant and its representatives. That on or about the 15th day of July, 1903, the master shipped and engaged an entire crew, who remained upon the said steamer and upon board of her, in charge of the master, and they were, as the crew, engaged in navigating the said steamer from the port of St. Clair, Michigan, to the port of Lorain, Ohio, and thence to the port of Duluth, Minnesota.

18th. That the complainant has never furnished any material in or about the building, fitting out, furnishing or equipping of said steamer "Winnebago," at the instance or request of the owner, part owner, master, clerk, agent or steward thereof, and that if the intervening complainant is entitled to any lien or claim against the said steamer "Winnebago," by virtue of the provisions of the statute referred to in the intervening complaint, the same must depend and arise solely from the provisions of the proviso contained at the end of the first paragraph of Section two of said Act, being paragraph 10,789 of the Compiled Laws of the State of Michigan for 1897, and that said proviso purports to give a lien to persons dealing with the contractor only to the extent that the said contractor might be entitled to a lien at the time of notice to the owner of such claim or lien; that on July 18th, 1903, this respondent paid the Columbia Iron Works, the contractor, the entire balance due on its contract for the construction, equipment, etc., of said steamer "Winnebago," and at the same time this claimant had not received any notice whatever from the intervening complainant of any claim or lien
146 upon its part against said steamer, and did not receive any such notice or have any knowledge of the fact that it had any unpaid account against said Columbia Iron Works until long after the making of said final payment on July 18th, 1903.

19th. That during all of the time that intervening complainant furnished material and supplies, as set forth in intervening com-

plaint, the said Columbia Iron Works were building and constructing a steel steamer known as the "Howard," which said steamer was launched soon after the "Winnebago," and during all of the time the said steamer "Winnebago" was being finished said steamer "Howard" was lying at the shipyards of the Columbia Iron Works at St. Clair, and was also being finished, equipped and fitted out by the said Columbia Iron Works.

20th. That the respondent had no knowledge as to whether or not complainant furnished the material mentioned in its complaint herein, or whether the same entered into the construction of the said steamer "Winnebago," or whether the same has not been paid for in full, and therefore leaves complainant to make such proof thereof as it may be advised is material.

That claimant further shows on information and belief that all of the material mentioned in the intervening complaint herein, that may have been ordered by the said Columbia Iron Works, was ordered by the said Columbia Iron Works on its own account, and not for any particular boat or vessel; and that said intervening complainant extended all of its credit to the Columbia Iron Works on its original orders, and did not furnish any material on the credit of the said steamer "Winnebago," or in reliance of any right or lien thereon.

21st. And this claimant further answering shows that the said Chapter 298 of the Compiled Laws of 1897, in so far as it might, by its terms, be applied to claimant's steamer "Winnebago," is
147 unconstitutional and void, being in violation of Section 8 of the First Article of the Constitution of the United States as depriving this claimant of its property without due process of law and without proper protection, and also as being in violation of the Second Section of the Third Article of the Constitution of the United States, conferring on the courts of the United States sole and exclusive jurisdiction in admiralty and maritime matters. And this respondent takes the same benefit thereof as if it had demurred to said complaint for the reasons herein set forth.

22nd. This claimant further alleges that at the time of the delivery of the said steamer, and on the 18th day of July, 1903, the same was not entirely finished, as it should have been, by the said Columbia Iron Works, and has since been finished at the expense of this claimant, and that in addition to the amount expended in finishing the said steamer, the said Columbian Iron Works is indebted to this claimant, for and on account of the damages suffered by this claimant, by reason of the failure of said Columbia Iron Works to finish and deliver the said steamer to this claimant on the 1st day of April, 1903, as, under the terms of its contract with claimant, it was bound to do, and that the damage occasioned by the failure of the Columbia Iron Works to finish the said steamer and deliver the same on April 1st, 1903, claimant has sustained damages in the sum of $10,000.

Wherefore, claimant prays that the intervening complaint of the intervening complainant herein may be dismissed with costs, and

for such other and further relief and redress in the premises as claimant is entitled to receive and the Court is competent to give.

IROQUOIS TRANSPORTATION CO.,
By THOMAS J. PRINDIVILLE, *Secretary.*

C. E. KREMER,
GRAY & GRAY,
Claimant's Attorneys.

STATE OF ILLINOIS, *County of Cook, ss:*

Thomas J. Prindiville, being first duly sworn, deposes and says that he is the Secretary of the claimant named in the foregoing answer; that he is authorized to subscribe to the said answer in the name of the respondent and that he has read the same and knows the contents thereof, and that the same is true of his own knowledge except as to the matters therein stated to be upon information and belief, and as to those he believes it to be true.

THOMAS J. PRINDIVILLE.

Subscribed and sworn to before me this 27th day of October, A. D. 1903.

THEO. C. ROBINSON,
[SEAL.] *Notary Public.*

148 *Opinion of Circuit Judge.*

STATE OF MICHIGAN:

Circuit Court for the County of Wayne.

DELANEY FORGE & IRON COMPANY, Complainant; GEORGE W. EDWARDS ET AL., Int'g Complainants,
vs.
THE STEAMER "WINNEBAGO."

In Re Claim of George W. Edwards *et al.,* Intervening.

The issue is not primarily on the sum due in this case, or the goods furnished, but as to whether the vessel is liable under the lien law provided by statute.

It is a luxury to hear a case so carefully and clearly presented on both sides.

Conflicting authorities were given at great length, but it appears from the reasoning of the Sarmiento case, 110 Michigan, and the case of Globe Iron Works *vs.* The John B. Ketchum, 2nd, 100 Michigan, that the materials furnished in the completion of this vessel, as claimed by the complainants herein, fall directly within the lien law. The reasoning of Mr. Justice Brown in the case of The James H. Prentice, in the 36th Federal, is convincing on the issues here. The supplies were furnished specially to enter into the construction of the ship, and the parties have a right to rely upon their

lien under the statute, for all materials furnished in good faith, for use in the construction of the vessel. This seems to be the intent and meaning of the statute, and from the testimony of Mr. Frank W. Eddy the goods claimed for were furnished for use in the "Winnebago." The complainants, at the time they furnished the goods, furnished two capstan windlasses and capstans, and side light equipment for each of two vessels, and capstan windlasses and capstans claimed for, being identified as for use for the construction of the "Winnebago," and the side lights furnished being half for each vessel, the equipment of each vessel being duplicate. The truth is that the materials went into the boat. There can be no mistake that the benefit was actually furnished and appropriated to the actual use and make-up of the steamer. There is not in this case, as there was in the principal case, a promissory note passed, hence no question was raised of any waiver of the lien in such manner.

I think that the case comes clearly within the statute providing lien, and that the materials were in good faith furnished for use in and about the building of the ship, within the meaning of the statute. The Iroquois Transportation Company contracted
149 with the Columbia Iron Works, and took this vessel before it was fully completed, but even though they had awaited until its entire completion, under the statute they took it subject to whatever claims were against it. The facts here are, though, that they took it hurriedly, before it was finally completed. I will not review the cases cited, touching a buyer in good faith in a case of this nature, and will say that the equities point strongly to a lien on the ship. The weight of authority in such matters, as more recently construed by Justices Brown and Lurton, leads to this conclusion, and also leads to the conclusion that this proceeding is properly within the meaning of the statute, and that this court has jurisdiction, and that this ship is a ship navigating the waters of the State, within the meaning of the statute.

The authorities cited by me in the principal case herein, of De Laney Forge & Iron Company *vs.* The "Winnebago," are relied on in this case, and apply here, and I also note the language of Judge Lurton in 68 Federal Reporter at page 95, in the case of Central Trust Company *vs.* Railway Company, where he says:

"Liens of the kind, except where the statute otherwise provides, arise by the operation of law, independent of the express terms of the contract, in case the stipulated labor is prformed or the promised materials are furnished, the principle being that the parties are supposed to contract on the basis that if the stipulated labor is performed, or the promised materials are furnished, the laborer or material man is entitled to the lien which the law affords," etc.

Taking the cases, together with the more recent citations from the State and Federal authorities, I am convinced without further argument that a lien attaches in this case for the full amount of the materials furnished for use in and about the building of the ship, which is testified to by Mr. Eddy as being $1,599.64, and the amount of $1,599.64, with interest from June 30th, 1903, is there-

fore allowed to the intervening complainants, George W. Edwards, Frank W. Eddy and George W. Edwards, executor, etc.

J. W. DONOVAN,
Circuit Judge.

Detroit, May 19, 1904.

150 At a session of the Circuit Court for the County of Wayne, convened and held at the Circuit Court rooms in the City of Detroit, on the 1st day of June, A. D. 1904.

Present, J. W. Donovan, Circuit Judge.

DELANEY FORGE & IRON COMPANY, Complainant; GEORGE W. EDWARDS ET AL., Int'g Complainants,
vs.
THE STEAMER "WINNEBAGO."

In Re Claim of George W. Edwards *et al.*, Intervening —.

Judgment.

This cause having been brought to trial before the Court without a jury, and the Court, after hearing the proofs and allegations of the parties and the arguments of counsel, having found that the said intervening complainants are entitled to recover in manner and form as the said intervening complainants have, in their bill of complaint in this cause, set forth, and that the said intervening complainants are entitled to recover, on occasion of the premises, over and above their costs and charges by them about their suit in that behalf expended, the sum of one thousand, five hundred and ninety-nine and 64-100 (1,599.64) dollars, with interest thereon from June 30th, 1903;

And it appearing that the steamer "Winnebago," proceeded against herein, has been released upon bond filed by the Iroquois Transportation Company, as Claimant and owner of said vessel, with the United States Fidelity & Guaranty Company, of Baltimore, Maryland, as surety, wherein and whereby said claimant and said surety subject themselves to the jurisdiction of this Court in this behalf;

Now, therefore, it is considered and adjudged, that the said intervening complainants do recover against the said claimant herein, the Iroquois Transportation Company, and the United States Fidelity & Guaranty Company, of Baltimore, Maryland, its said surety, their damages aforesaid, together with their costs and charges aforesaid, to be taxed; and that said intervening complainants have execution therefor.

151 STATE OF MICHIGAN:

The Circuit Court for the County of Wayne.

No. 63, B. & V.

GEORGE W. EDWARDS ET AL., Intervening Complainants in the Cause of De Laney Forge & Iron Company, Complainant,

vs.

STEAMER "WINNEBAGO."

Claim of Appeal.

Now come the Iroquois Transportation Company and the United States Fidelity & Guaranty Company, of Baltimore, Maryland, against whom the judgment in the above entitled cause was rendered, and who are the parties defending against said judgement, and thinking themselves aggrieved thereby, do hereby, in accordance with the statute in such case made and provided, by Gray & Gray, their attorneys, claim an appeal from said judgment to the Supreme Court of the State of Michigan.

IROQUOIS TRANSPORTATION CO.,
By GRAY & GRAY, *Its Attorneys.*
UNITED STATES FIDELITY & GUARANTY COMPANY,
By GRAY & GRAY, *Its Attorneys.*

Detroit, June 9th, 1904.

STATE OF MICHIGAN:

The Circuit Court for the County of Wayne.

No. 63, B. & V.

GEORGE W. EDWARDS ET AL., Intervening Complainants in the Cause of De Laney Forge & Iron Company, Complainant,

vs.

STEAMER "WINNEBAGO."

Bond on Appeal.

Know All Men By These Presents, That the Iroquois Transportation Company, a corporation organized and existing under the Laws of the State of Indiana, and the United States Fidelity & Guaranty Company, of Baltimore, Maryland, a corporation, and Thomas J. Prindiville as surety, are held and firmly bound unto George W. Edwards, Frank W. Eddy and George W. Edwards, executor of the estate of H. D. Edwards, deceased, co-part-
152 ners as H. D. Edwards & Company, in the sum of thirty-two hundred ($3,200) dollars, lawful money of the United

States of America, to be paid to the said George W. Edwards, Frank W. Eddy and George W. Edwards, executors of the estate of H. D. Edwards, deceased, co-partners as H. D. Edwards & Company, or to their certain attorneys, successors or assigns, to which payment well and truly to be made, they, and each of them, bind themselves and their heirs, executors, administrators and successors and each and every of them firmly by these presents.

The Condition of This Obligation is Such, That,

Whereas, In a certain suit recently prosecuted in the Circuit Court of the County of Wayne and State of Michigan, by the said George W. Edwards, Frank W. Eddy and George W. Edwards, executor of the estate of H. D. Edwards, deceased, co-partners as H. D. Edwards & Company, against the steamer "Winnebago," wherein the above bounden Iroquois Transportation Company, is claimant, and said United States Fidelity & Guaranty Company, of Baltimore, Maryland, is surety upon the bond given for the release of said steamer from custody, a final judgment was rendered by said Circuit Court on the first day of June, 1904, in favor of said George W. Edwards, Frank W. Eddy and George W. Edwards, executor of the estate of H. D. Edwards, deceased, co-partners as H. D. Edwards & Company, against said Iroquois Transportation Company and the United States Fidelity & Guaranty Company, of Baltimore, Maryland, for the sum of fifteen hundred and ninety-nine and 64-100 dollars ($1,599.64), with interest thereon from June 30, 1903, and costs to be taxed, and an appeal to the Supreme Court of the State of Michigan, has been taken from said judgment by the above bounden Iroquois Transportation Company and the United States Fidelity & Guaranty Company, of Baltimore Maryland.

153 Now, therefore, if the said Iroquois Transportation Company and the United States Fidelity & Guaranty Company, of Baltimore, Maryland, shall and do well, truly and perfectly abide such order as may be made by the Supreme Court of the State of Michigan, in said suit in the matter of said appeal, then this obligation shall be void, otherwise, to remain in full force and virtue. And a further condition hereof is that judgment may be entered against all of the parties hereto in accordance with such order as the Supreme Court may make and enter on said appeal.

IROQUOIS TRANSPORTATION CO.,
By C. E. KREMER, *Pres't.*
THOMAS J. PRINDIVILLE.

Attest:
THOMAS J. PRINDIVILLE, *Sec't'y.*

[Iroquois Seal Transportation Company.]

THE UNITED STATES FIDELITY & GUARANTY COMPANY,
GEORGE D. WEBB, *Att'y-in-Fact.*

[United States Fidelity Seal & Guaranty Company, Incorporated 1896.]

STATE OF ILLINOIS, *County of Cook, ss:*

C. E. Kremer, of Chicago, being duly sworn, deposes and says that he is president of the Iroquois Transportation Company, an Indiana corporation; that said corporation is the owner of the steamer "Winnebago," and is the claimant against whom the
154 judgment referred to in the foregoing bond has been rendered; that he has signed the foregoing bond on appeal in said case on its behalf, being duly authorized so to do.

C. E. KREMER.

Subscribed and sworn to before me this 9th day of June, A. D. 1904.

CHARLES W. GREENFIELD,
Notary Public, Cook County, Illinois.

My commission expires May 7, 1907.

STATE OF ILLINOIS, *County of Cook, ss:*

George D. Webb, of Detroit, Michigan, being duly sworn, deposes and says that he is attorney-in-fact of the United States Fidelity & Guaranty Company, of Baltimore, Maryland; that said corporation is the surety against whom judgment was rendered as such as set forth in the foregoing bond, and that he has signed the foregoing bond on appeal on its behalf, being duly authorized so to do.

GEORGE D. WEBB.

Subscribed and sworn to before me this 9th day of June, A. D. 1904.

LEW H. WEBB,
Notary Public, Cook Co., Ill.

My commission expires April 24, 1905.

I, William McGregor, Clerk of the Circuit Court for the County of Wayne and State of Michigan, do hereby approve the surety on the within bond on appeal of the Iroquois Transportation Company, and the United States Fidelity & Guaranty Company, of Baltimore, as to its responsibility.

WM. H. McGREGOR,
County Clerk,
By C. H. AUSTIN, *Deputy.*

155 *Stipulation.*

STATE OF MICHIGAN:

The Circuit Court for the County of Wayne.

No. 63, B. & V.

GEORGE W. EDWARDS ET AL., Intervening Complainants in the Cause of De Laney Forge & Iron Company, Complainant,

vs.

STEAMER "WINNEBAGO."

In order to do away with the necessity of taking testimony *de novo* on an appeal in the above entitled cause, it is hereby stipulated that the testimony taken upon the trial of said cause in the Circuit Court for the County of Wayne, may be returned to the Supreme Court and treated as original depositions taken in said cause, and the case heard in the Supreme Court upon said testimony and such additional testimony as the parties may desire to take under the statute in such case made and provided. It is further agreed that the testimony of the witness Lovejoy may be used with the like effect as though the witness had been sworn.

SHAW, WARREN, CADY & OAKES,
Attorneys for Complainant and Appellee.
GRAY & GRAY,
Attorneys for the Iroquois Trans. Co., Claimants of said Str., and U. S. Fidelity & Guaranty Co., Baltimore, Md., Surety on the Bond of Claimant.

Stipulation.

STATE OF MICHIGAN:

The Circuit Court for the County of Wayne.

GEORGE W. EDWARDS ET AL., Intervening Complainants,

vs.

STEAMER "WINNEBAGO."

It is hereby stipulated that the annexed is a true copy of the testimony taken in the trial of said cause in the Circuit Court for the County of Wayne, together with the exhibits referred to therein.

SHAW, WARREN, CADY & OAKES,
Attorneys for Intervening Complainants and Appellees.
GRAY & GRAY, *Attorneys for Claimant.*

May 13, 1904.

156 DELANEY FORGE & IRON CO.
vs.
STEAMER "WINNEBAGO," H. D. EDWARDS ET AL., Intervening.

Messrs. Shaw, Warren, Cady & Oakes, for Complainant.
Messrs. Kremer and Gray, for Defendant.
Donovan, J.

FRANK W. EDDY, sworn for examination.

By Mr. OAKES:

Q. Where do you reside?
A. In this city.
Q. What is your business?
A. I am one of the partners of H. D. Edwards & Co.
Q. Mr. Eddy, I wish you would just state to the Court what your connection is with that concern; what your duties are, what your position is?
A. Well, I presume I am the general manager of the business; Mr. Edwards is away a great deal, and he and I run it together.
Q. I wish you would state to the Court, in as complete a way as you can, what, if any, business you had with the Columbia Iron Works in 1902 and 1903; what, if any, materials you furnished to them for use in the steamer Winnebago?
A. Well, we commenced doing business with the Columbia Iron Works about when they started their plant, and sold them quite a number of goods for their plant.
Q. What were the terms and condition of the sale of those goods?
A. Well, cash terms, usual terms about 60 days' time; very often we had to wait a little longer on our customers than that, and sometimes they paid cash.
Q. I do not know it appears in the record, but what is the nature of the business of your concern down there?
A. Well, one department is called the ship chandlery department, where we sell largely to shipbuilders and contracting people in that line.
Q. Your first dealings with the Columbia Iron Works as to material were not in connection with any ship?
A. No, I should judge not.
Q. And at that time was there any talk or agreement with reference to furnishing later for ships?
A. Well, we naturally expected to furnish them a great many goods later for ships, because we furnish shipbuilders in this section very heavily.
157 Q. And did you later furnish supplies or materials that went for the Winnebago?
A. Yes, sir, we did.
Q. That ship was known as Hull No. 1?
A. Ship No. 1.
Q. State to the Court what the conditions were under which you furnished supplies for her, and materials?

A. Well, we furnished, I think, the first, if I remember right, the first item that we sold to that boat was a ship windlass, and the capstan, and the machinery that goes with that.

Q. What was that furnished for—do you know what that was furnished for, the particular ship?

A. The first one I know went on a boat that they called Ship No. 1.

Q. What was the price of that, Mr. Eddy, the price for which it was furnished?

A. I may have to refresh my memory, I made the price at the time; well, that outfit, and the steam capstan that they used; and they placed orders at the same time, the capstan goes aft, we sold to them $1,385, f. o. b. Providence, they to pay the freight on it.

Q. What supplies or materials were furnished subsequent to that time by you for the Winnebago?

A. Well, we furnished a number of brass sidelights, that entered into the construction of the vessel, that we knew were to go on board the vessel, and which did go on board the vessel.

COURT: Get the value of these as you go along, if you have a bill of it.

A. Well, these items, brass sidelights, amount to $183.51.

Q. I wish you would read the item?

A. Well, ten 10-inch brass sidelights, four 8-inch brass sidelights, four 12-inch brass sidelights.

158 Q. And the total?

A. The total amounts to $183.51.

Q. That totaled $183.51; will you look at that and see if any other item is not included with it?

A. Well, yes, sir, another little item on the same day of $1.11.

Q. That is not connected with the sidelights?

A. There were ten sidelights, $91.20; four sidelights, $18.24, and four for $72.96; now at the same time there is another item of sidelights.

Q. What date?

A. April 27th.

Q. Read those?

A. 22 sidelights, $200.64, and 4 sidelights for $18.24; now, part of those sidelights went on the Winnebago.

Q. Well, what part, Mr. Eddy?

A. Well, that I could not positively say further, I have not the data, but I should say the half of those combined items went on board the Winnebago.

Q. Do you know whether or not your concern furnished sidelights for the Howard as well?

A. Yes, sir, and these are part of the sidelights.

Q. Do you know whether you furnished all the sidelights for those two ships?

A. I suppose we did.

Mr. KREMER: I object to that as not evidence, what he supposes, certainly.

COURT: Well, it is not strictly; you can get it, however.

Q. Are you able to refer to your files, or your office, anyway, and determine what portion of these sidelights were furnished for the Winnebago?

A. I can.

Q. Can you ascertain from the correspondence?

A. I know I have not the correspondence here for that.

Q. Well, we will take that up in the morning. Now, will
159 you look under date of May 6th and see whether or not the item that was furnished was for the Winnebago?

A. Yes, sir, 600 lbs. of mineral wool, $10.20.

Q. What was that furnished to the Winnebago for?

A. To put around the engine room, or around the engine for non-conductor.

Q. Look under date of June 1; what do you find there?

A. One brass dead light, $18.24.

Q. What was that furnished for, if you know?

A. I could not say.

Q. Was there anything furnished under date of June 30 to the Winnebago?

A. Some repairs to the windlass.

Q. What is the item?

A. Two finished friction bands for hand wheels, $4.00.

Adjourned.

MAY 14, 1904.

JOSEPH A. BOWER, sworn for examination.

By Mr. OAKES:

Q. Where do you reside?

A. City of Detroit.

Q. What is your business?

A. Connected with the Detroit Trust Co.

Q. Mr. Bower, do you know of some of the books and papers of the Columbia Iron Works having been turned over to the Detroit Trust Co., as trustee in bankruptcy?

A. Yes, sir.

Q. I wish you would state to the Court who has charge of those books for that company?

A. I generally look after such work as that.

Q. I wish you would state to the Court whether the letters received by the Columbia Iron Works were turned over to your company with the other papers?

A. No, sir, they were not.

160 Q. Did you make attempts to get those?

A. I have written for them several times, and asked Mr. Stewart to speak for them several times when he was up there, which he did.

Q. State whether you have ever been able to get those letters from the bankrupt?

A. No, sir.

Q. That is all.

No cross-examination.

Mr. EDDY, recalled:

Q. Mr. Eddy, I show you a paper marked Exhibit "1."

MR. KREMER: I object to this; the principal objection is that it contains a lot of matter that has no bearing upon the case and unnecessarily encumbers the record, without adding anything to the evidence already in.

MR. CADY: We are limiting the offer to those items identified and perhaps initialed by Mr. Eddy, which would eliminate his objection.

MR. KREMER: Why should a written statement of what the witness has testified to be in evidence at all; he has testified to the articles that were furnished the defendant, that they were furnished, and the value; why introduce a voluminous paper, which contains, among other things, the very items about which he has testified?

COURT: I think we will take the oral testimony, and if he fails to remember anything that he may refresh his memory by it.

MR. KREMER: No objection to that.

MR. OAKES: My purpose in taking it up in that course is to have the dates in, if he can give the dates and items furnished for the Winnebago.

MR. KREMER: I have no objection to that.

Q. Using the paper to refresh your recollection as to dates
161 and amounts, just read the dates and the aomunts of the items?

A. Well, Feb. 11 we billed them, charged the Columbia Iron Works, on the new Boat No. 1, one No. 1 Providence new style steam capstan, windlass, with new locking gear, iron side, pawl betts, steel bevel gear, gypsey ends, overhead friction arrangement, and double 6 x 8 inverted reverse valve engine, $975; one D. Providence steam capstan, with double 5 x 7 brass link reverse engine, $410, a total on that date of $1,385.

On April 2nd, we likewise made this charge: 10 10-inch brass sidelights, $91.20; four 8-inch brass sidelights, $18.24; four 12-inch brass sidelights, $72.96.

MR. CADY: Mr. Eddy, you said you made this charge—from what, explain that, the nature of the memoranda?

A. We shipped them these items, and it was part of an order placed to go on their hulls No. 1 and 3 for sidelights; this is only a partial shipment; later shipped them more sidelights. Shall I pass on?

Q. The next item?

A. The next shipped them April 3; this item, I know, did not go on the Winnebago; this went on the Howard.

Q. I do not care for the items that do not relate to the Winnebago.

A. Now, on April 27 there was another shipment to them of brass sidelights, 22 10-inch, amounting to $200.64, and four 8-inch sidelights, at $4.56, amounting to $18.24; that was part of that contract for the sidelights for the two new boats that they were building, and some of them went on each boat. The next item, May 6th, 600 lbs. of mineral wool, $10.20.

COURT: The same as you had yesterday—in fact, they are all the same?

Mr. OAKES: Yes, sir; identifying the dates now.

162 A. June 30, two finished friction band hand wheels, at $2 each, $4.00.

Q. I believe you stated yesterday that you were in the business of furnishing material for the construction of ships, and for the running of ships; I wish you would state to the Court whether you furnished goods to the Wheeler ship yards at the time that yard was financially embarrassed?

A. We did.

Q. I wish you would just state the conditions on which those goods were sent, the goods for the Winnebago, the terms and conditions?

Objected to, as the witness has already testified to the terms, besides, that is not the best evidence, if it is a matter of correspondence.

COURT: Did you do it in letters, or did you have a talk with one of them?

A. We had a talk with them.

Q. Which one?

A. I do not remember certain.

Q. One of the head men?

A. Yes, sir.

Q. Did you?

A. Sometimes I did, and sometimes sent a man there to take orders after the terms were made.

Q. Did you make the terms?

A. Yes, sir.

Q. If you have not stated the terms, we will have it again, so that it will go on the record; state it like in a dialogue, who came in, you went in, and just what he said, and what you said to that; did he come to your place?

A. They have been in there a good many times.

Q. I mean about this first arrangement?

A. No positive terms made then.

Q. What was the first?

163 A. From time to time we either quoted them by letter terms 60 days, or something of that kind; a great many orders placed on the regular terms, which are supposed to be 60 days.

Q. What I mean is, did you have any special conversation with one of the head men, you may state what it was in dialogue form; did you go up there, or he down here?

A. No, they were in the office.

Q. Can you tell how long ago?

A. No, sir; a great many men come in.

Q. Can you remember that a certain man came once?

A. To the best of my recollection, yes, sir.

Mr. KREMER: Now, what is it for? A man may remember an occurrence, a journey, and the like, and not remember what it cost him.

Mr. OAKES: The purpose was to get at the conditions of this sale and determine upon the question of credit, and whether, as in the preceding case, a number of authorities were cited from which it was urged that it must be shown that credit was given to the vessel. I do not think that is the law, but to meet that statement or claim of the law, I think it should appear what the witness gave credit to.

Objected to as a conclusion; the conversation, the entries in the books, the letters, the bills are better evidence, I think, than a conclusion.

COURT: You have the Edwards letters, Mr. Gray?

Mr. GRAY: We have handed all we had to Mr. Oakes; remember, we are not the Columbia Iron Works; we have no more access to them than they have.

Q. Do you remember anything in the way of a dialogue you had?
A. No, sir.
Q. Well, what?
A. Well, they may have written us for prices, and we
164 quoted them; may or may not have mentioned terms; we may have made terms 60 days.
Q. Did you ever have any talk about this particular vessel or boat?
A. No, sir, no more than perhaps they wrote us and the American Ship Windless Co., for instance, on the item of the windlass for that boat, and we quoted them the price, and sent a man there probably to take the order after the price and terms had been made; that is as near as I can give that particular transaction. It was understood that they were getting this windlass for that new boat.
Q. How did you understand that?
A. Because they had this new boat and wrote asking price on it.

Paper marked Exhibit "2."

Q. I show you paper marked Exhibit "2." I will state to the Court, this is a copy of the letter written to the Columbia Iron Works, and we offer this in view of the fact that we have not been able to find the original letter.

COURT: You may ask him that; did you take that from your copy book?

A. Taken from our copy book, and read back by our stenographer.

Objected to; it does not specify Winnebago; it may just as well refer to the Howard.

Q. Do you recognize that?
A. Yes, sir.
Q. As what?
A. This was our inquiry for prices.

DETROIT, MICH., *Aug.* 28, 1902.

Roger J. Donavan, Esq., Columbia Iron Works, St. Clair, Mich.

DEAR SIR: The American Ship Windlass Company wish
165 us to send you blue prints in answer to your letter of August 22nd. We are sending you blue prints accordingly of No. 4

steam cap windlass, which is the right size for 1⅜ chain. We understood some time since that you would be in the market for steam capstan to carry 1⅜ chain, and think this is doubtless the size you wish blue print of. The blue print will give the size of bed plate and the approximate position of the hold-down bolts, but it is not safe to drill your hold-down bolts from the blue print, as the holes scored are liable to vary slightly from the blue print. The print is all right, however, to prepare the deck from. We also send you print showing No. C stem capstan with 4x6-inch non-reversing engine, hung up under the deck; also blue print showing No. D steam capstan with 5x7-inch brass link reverse engine laid down on top of the deck. This print shows both styles and both positions of engines; the bed plates for linked reverse engine are about 3 to 4 inches wider than for non-reversing engines. If you will let us know whether you wish non-reverse engine, or the brass link reverse engine, or whether they are to hang up or to lie down, we will send you blue prints which are just right, providing these we are sending do not show the right engine. As regards bolt holes in capstan bed plates, it would be well not to drill until the bed plate itself is received, as the holes might vary a little. The blue prints, however, give the location near enough so that you could arrange the beams, etc., to clear. If there is any further information you desire, let us know, and we will be glad to furnish it.

Yours truly,

H. D. EDWARDS & CO.

COURT: Do you care to read all those letters in as you have pinned them together?

Mr. OAKES: Some are originals, and some copies; some from the Columbia Iron Works to us, and the others copies of letters from us.

166 COURT: The originals of which you are unable to obtain.

Mr. OAKES: There are 20 letters here; I will offer them in evidence and read them in the record.

Mr. GRAY: We cannot make our objections until we see them.

COURT: He offers a package of 20 letters.

Q. Mr. Eddy, you may identify those if you can; look them over, and see what they are. (Witness examines letters.) You identify them as correspondence between yourself and the Columbia Iron Works?

A. And the American Ship Windlass Co.

Q. And these copies are copies that you know were made from the original, were they not?

A. They were made exactly, and read back carefully.

Q. We will read this letter.

Objected to until we inspect them.

Mr. GRAY: Will we examine the letters?

COURT: Yes, and save time.

Q. Now, Mr. Eddy, you may state to the Court whether or not the prices set forth as you have stated them were fair and correct?

A. The prices were all low; very close prices.

Q. State to the Court whether or not the amounts have been paid, whether the account is still due?

A. The account is still due.

COURT: What is the amount of it?

Mr. OAKES: He has read it into the record, with the date. That is all.

Cross-examination:

Q. You began to do business with the Columbia Iron Works first in the summer of 1902, did you not?

A. I think we did.

Q. And you sold them different kinds of goods out from your store, from that time until practically the time they failed?

167 A. Yes, sir.

Q. When you began business with them, they had not yet begun building ships?

A. No; we knew, of course, they intended to build ships.

Q. They had not begun to do so; when you opened the account on your books, with whom did you open it?

A. With the Columbia Iron Works.

Q. How much in the rough figures that you sold them from first to last?

A. I could not tell you that without looking; I presume I should have been willing to sell the Columbia Iron Works, directly on their own account, in view of the large trade we expected to get, I would have been willing to sell them $1,200 to $1,500 on the start off, but with this in view, that they were going to build boats, and the amount of the cost involved in those boats would be largely in excess of their purchases, and that we would have a lien upon the boat——

Mr. KREMER: I move to strike out the conclusion, and the thought, and the reasons.

COURT: What you concluded or decided might not have been known to them, but what you brought home to them, might have gotten from them.

Question repeated.

A. Including the lien we had on them?

Q. Yes, including everything?

A. Well, I should say between $5,000 and $6,000.

Q. That all appeared and did appear in your books against the Columbia Iron Works?

A. Yes, sir, it would.

Q. Did you keep any separate account in your ledger under the head of ship No. 1, or steamer Winnebago?

A. No, sir, it has not been customary for us to do it.

Q. Did you in the account of the Columbia Iron Works

168 specify the iron and the windlass as for No. 1, or the Winnebago?

A. No, sir.

Q. Did you itemize any of the items, or specify them as having been delivered on the Winnebago?

A. I do not suppose we did.

Q. And then your information as to what boat they were intended for must come from other sources than your own books?

A. The orders mention.

Q. You furnished a duplicate of the windlass and the capstan to the Columbia Iron Works on their order.

A. Of the one furnished on the Winnebago specified.

Q. Which one was furnished first?

A. On the Winnebago.

Q. Do you know of your own knowledge whether the windlass and the capstan furnished for the Winnebago was put in her?

A. I know it was.

Q. Do you know that?

A. I know from the correspondence that they received the windlass and wished us to send the repairs for it, that they claimed did not arrive with the other parts.

Q. You haven't any knowledge of having seen it on the boat?

A. Yes, sir.

Q. And it is from your conclusion that they were to do certain things that it was on board?

A. And from the fact our men saw it there.

Q. That is hearsay, and these men told you?

A. Yes, sir.

Q. Now you have testified to the furnishing of certain sidelights, how do you know that those were furnished to the No. 1;

169 how did you know; originally when an order came in was there anything said about their being for No. 1, or No. 3?

A. I do not remember, but I presume that there was; because I am morally certain we bid on the sidelights and furnished what sidelights were wanted on the Winnebago and Howard.

Q. How do you know that?

A. Because we made a specific bid, and we know from the number of sidelights, we know that we sent them for no other purpose.

Q. Do you know it is a fact that certain of those sidelights are there in the yard yet?

A. I am not certain about that.

Q. These sidelights are already manufactured, and kept in stock by some one?

A. No, sir, we made them to order; I will say in our store we carry sidelights, but these carried and kept in stock are not manufactured by special order.

Q. Now do you testify positively of your own knowledge that these sidelights were ordered, and at the time they were ordered, it was specified they were for No. 1; what you have of your own knowledge, not what you know from your own salesmen?

Objected to.

COURT: What do you say?

A. I can only be sure as I am in this way; we have to take in a

business way a great many things of that sort; I am as morally certain of this as I can be.

Q. You have no personal knowledge here, distinct from the knowledge you have gained from your salesmen; no knowledge from either a letter, or from personal, an employee or man in the Columbia Iron Works, that the order so specified.

A. He did not tell me so personally of course, but the
170 order was entered by us and the prices usually made by us with the full understanding the sidelights were for these two boats.

Q. That information came to you direct from the Columbia Iron Works, or if at all through your salesmen who entered it upon the books?

A. I would not say that.

Q. Do you say you made the entry yourself?

A. No, sir, I did not make entries; I make the prices.

Q. Who did?

A. Oh, one of our clerks I had.

Q. Do you know which one entered it?

A. No, sir, I do not.

Q. Do you know that order contained a statement it was for 1 and 3?

A. No, sir, I do not.

Q. Of your own personal knowledge and examination, do you know which of those lights were used on the number 1, and on the Howard?

A. Not of my personal knowledge, I know they were used on both boats.

Q. Do you know of your own personal knowledge they were used, or what somebody told you?

A. Well, I did not see them on the boats of course.

Q. And then somebody told you that they went in the boat, either from some of your employees, or someone else?

A. Well, the inference would be, I do not know how far knowledge goes. Whenever you get a bid in for a certain lot of goods, to go on two boats, and you have them made purposely, and all that, I think you are justified in saying they did go on the boats.

Q. Now is not this the fact, that the presumption would be they did go on the boat; is not that as far as you can go?

171 A. Well, I have not been up to see the boats.

Q. Personally you do not know whether they went in there or not from an examination?

A. No, sir, I did not examine, and check off on the boats.

Q. Do you know how many ten-inch lights were upon the Winnebago?

A. No, sir.

Q. Or how many eight-inch lights?

A. No, sir.

Q. You do not know about the distribution of them between the two boats?

A. No, sir.

Q. You do not know whether one took half, and the other half, or whether one took more than the other?

A. No, sir, but they were duplicates, and they probably would divide them up in that way; and still they might use different lights on the different boats.

Q. Do you know the Howard was 24 feet longer than the Winnebago?

A. No, sir, I do not know it.

Q. And then when you speak of them as duplicates, are you not positive?

A. Well, when the order came, they said they were duplicates, and when they ordered engines they specified them to be duplicates, and the Winnebago——

Q. Now when you sent in the schedules, did you specify they were to be on the Winnebago or the Howard?

A. I do not think the boats were named when the order was placed for them.

Q. When you sent the goods did you specify in the bill they were for any particular craft?

A. I do not know that we did, not knowing the boats' names.

Q. Did you specify that they were for No. 1 or No. 3?

172 A. I would not remember about that; I would not have cared whether we did or not.

Q. When you sent up the sidelights, did you specify them for No. 1 or No. 3, or both?

A. That I do not know.

Q. And when you sent up the mineral wool did you say whether that was for No. 1 or No. 3?

A. No, sir, I do not think we did, I must say.

Q. Mineral wool is used for different purposes, including use for ships?

A. Yes, sir.

Q. It can be obtained from other dealers, as well as your concern?

A. Yes, sir.

Q. Did you receive any payment on account of these things?

A. No, sir.

Q. None at all?

A. Not a cent on these things.

Mr. GRAY: $412.16, paid March 12, 1903.

A. That was not on account of these things, but the previous bills as our ledger will show; our ledger is balanced to a cent up to this date.

Q. A payment of $412.16, which balances account previous to that payment?

A. Previous to furnishing any of these goods.

Q. That was placed to the credit of some book account in which these things appeared subsequently?

A. I think very likely it was.

Q. Do you furnish sailing and steam vessels with ship chandlers' supplies?

A. We generally do.

Q. In doing that when you open an account, do you frequently open an account with the vessel itself?

173 A. Yes, sir, and frequently with the owners of it, without specifying the ship itself, I would just as lief open an account with you, whether you owned a ship or not.

I move to strike that out.

COURT: Strike that out; that is a court question.

Q. Do you know now up to what date that payment of $412.16 balanced your account?

A. I can tell you by looking at this invoice, everything was paid.

Q. Just answer the question, if you can?

A. That was in payment of goods furnished prior to February 2nd; the account is balanced up to that date.

Q. That is all.

ROBERT C. BAXTER, sworn for plaintiff.

Examined by Mr. OAKES:

Q. Where do you reside?

A. 144 Brainard street, city.

Q. What is your business?

A. Clerk for H. D. Edwards & Co.

Q. I wish you would just state what you- connection is in that establishment with reference to the work there?

A. My position is order clerk, and the shipping clerk is under me, his instructions for shipping and everything is given by myself; I have charge of the shipping department.

Paper marked Exhibit "3."

Q. I show you a paper marked Exhibit "3," and ask you if you identify it?

A. Yes, sir.

Q. State to the Court what it is?

Mr. KREMER: I would just as lief you would leave it out, and let him testify to the fact.

Q. What can you say as to the shipment of certain things

174 by your concern, to the Columbia Iron Works, on April 4th, 1903?

A. This shipment here consists of three barrels brass side lights shipped on April 4th, by the Rapid Railroad Company to St. Clair.

Q. You had charge of this shipment?

A. Yes, sir.

Q. And you know of the shipment?

A. Yes, sir.

Q. Take the next. State to the Court what you know of the shipment May 6th, 1903?

A. That consisted of 12 bags of mineral wool shipped by the Rapid Railway Company and shipped on May 6th.

Q. Now, the date of April 27, 1903, do you know of a shipment of a number of barrels to the Columbia Iron Works at that time?

A. Yes, sir.
Q. What was the shipment?
A. Consisted of a shipment of three barrels of brass side lights shipped by Rapid Railway April 27th.
Q. On June 1st?
A. Yes, sir, one box of glass, sidelights, billed out as box of glass, shipped to the Columbia Iron Works, June 1st, by the Rapid Railway.

Papers marked Exhibits "4," "5" and "6."
Mr. KREMER: I do not like to cumber up the record.
Mr. CADY: We will meet you half way on that.

Q. Did you have charge of the shipment of any windlass to the Columbia Iron Works by your people?
A. No, sir, I did not.
Q. State whether any were shipped from your store in Detroit?
A. No, sir, they are not shipped from Detroit.
Q. The company represents the American Ship Windlass Co.?
175 A. We did.
Q. And sent to them?
A. Yes, sir.
Q. What is the custom of taking windlasses and capstans from your house?

Objected to.

COURT: Inquiries in this case were posted to another company in the windlass business?
A. Yes, sir.
Q. What was done with an order for a windlass that came to your house?
A. The order placed with the American Ship Windlass Co., and shipped them direct.
Q. Direct?
A. Yes, sir.
Q. That is all.

Cross-examination:

Q. From Providence, R. I.?
A. Yes, sir.
Q. Did the order come from the Providence Ship Windlass Co. to you?
A. That I could not say.
Q. You do not know whether it was chargeable to H. D. Edwards, or chargeable to the Columbia Iron Works?
A. That I know, chargeable to the Columbia Iron Works, but it was billed to them, and charged to us.
Q. That was charged to you?
A. Yes, sir.

Mr. OAKES: The books of the Columbia Iron Works, I wish to have the record show what they show.

COURT: Bring it out by somebody.

Mr. OAKES: Mr. Jenks is not here to identify them; they have been identified once.

COURT: That is sufficient, in companion cases.

176 Mr. GRAY: The way I feel about the books, they are not proper evidence against us. In the other case, Mr. Jenks was called by us, and on cross-examination they were introduced on the theory they were against the witness we called, and therefore they were against us. We do not dispute that these are the books, and the entries were made in the ordinary course of business; but we do not admit that they are proper evidence against us; if Mr. Oakes wants to have Mr. Jenks here to identify the books, we do not object, and it may be considered that Mr. Jenks has been called and has identified the books as he did in the other case, subject to our objection, but he does so as Mr. Oakes' witness.

COURT: That is proper.

Mr. OAKES: On page 262 of the ledger of the Columbia Iron Works I find under date of February 11, H. D. Edwards' account, credited account of hull No. 1, $1,385; on April 2nd, under date of April 2nd, on page 263, of the same ledger, hull No. 1, is charged and H. D. Edwards & Co. credited with $91.20; on the same date, hull No. 3, is charged and Edwards credited with $91.20. On April 27th hull No. 1 is charged and Edwards & Co. credited with $109.44, and on the same day, hull No. 3, is charged and Edwards & Co. credited with $109.44. On May 6th and 7th, ledger, page 254, hull No. 1 charged and Edwards & Co. credited with $10.20. On June 1, Edwards & Co. is credited and hull No. 1 charged with $9.12; same date hull No. 3 is charged and Edwards & Co. credited with 9.12, and on June 30th, hull No. 1 is charged and Edwards & Co. credited with $4.

Mr. KREMER: I want to show for the purpose of cross-examination that the total amount of Edwards & Co., as shown by the figures, is $4,185.01, and that it embraces items for store room,

177 boiler and engine; forge shed, machine shop stores, forgings for steamer Buhl and power house items.

Objected to as incompetent and irrelevant, and also object to the June 1st, $9.12, as there is no testimony of Mr. Eddy of any item on that date.

We offer in evidence the certificate of enrollment and license of the Winnebago, certified copies of them, referred to as Exhibit "A" and "B," and also the bill of sale, dated July 19, from the Columbia Iron Works to the Iroquois Transportation Company, Exhibit "C"; and the agreement for possession of the ship, dated July 18th; an agreement between the Columbia Iron Works and the Iroquois Transportation Company, Exhibit "D."

Also the notice dated August 25th, 1903, to Messrs. Prindeville & Co., agent- for owners of the steamer Winnebago, and Thomas J. Prindeville, agent for owners of the steamer Winnebago. Marked Exhibits "E" and "F."

Capt. THOMAS J. MORAN, sworn for plaintiff.

Examined by Mr. OAKES:

Q. Capt. Moran, you were the master of the steamer Winnebago after she was fitted out, and went into commission last year?
A. Yes, sir.
Q. Have you a copy of the charter that your boat had for that season?
A. No, sir.
Q. I understood you to say in testimony in the preceding case her regular run was for carrying steel rails from somewhere in Ohio?
COURT: Let him state it.
Q. Where was it captain?
A. Yes, sir, from Lake Erie to Superior.
Q. Carrying up through the Detroit river?
A. Yes, sir.
178 Q. Passing the Lime Kiln crossing?
A. Yes, sir
Q. Stop at any points except Lake Superior?
A. No, sir, no points until we got to Superior; we left Lorain and stopped at no place until we get through to Superior.

Mr. OAKES (resuming):

Q. In going up on this run, you go through the Grosse Pointe cut?
A. Yes, sir.
Q. Through Lake St. Clair?
A. Yes, sir.
Q. Take the usual course from Fort Gratiot to Sand Beach, and from there to Thunder Bay Island, and the Detour passage?
A. Yes, sir.
Q. You are in Michigan waters during that trip?
A. I could not say.
Q. How many miles off the shore when passing Sand Beach?
A. Well, the usual course, four miles off Sand Beach?
Q. How far from Thunder Bay Island?
A. About for or five miles.
Q. In going up that way through Hay Lake channel?
A. Yes, sir.
Q. From White Fish Point, and Keweenaw Point, you take the usual course, so as to strike Keweenaw not more than four or five miles off?
A. Well, differs; some people do keep off from Keweenaw Point so that they can make a straight course to Devil's Island.
Q. How far off from Eagle Harbor?
A. 12 or 15 miles.
Q. And then straight to Devil's Island?
A. Yes, sir.
179 Q. You went through the Portage?
A. Yes, sir.
Q. Instead of going on the Canada side?
A. Yes, sir, with a load once.

Q. Also went to the port of Marquette with a load?
A. Yes, sir.
COURT: You could take the north shore, and go around by Port William?
A. Yes, sir.
Q. You did go on the American shore?
A. Well, you are possibly 30 or 40 miles from the shore up the lakes.

Cross-examination:

Q. How long had you been on the Winnebago before she started out on her first trip?
A. I went there in 1892 at Christmas time, and was there until she went out.
Q. What did you have to do?
A. I had to do with the building of the boat.
Q. What day was she launched?
A. March 23, 1903.
Q. When did she leave?
A. On July 19th.
Q. Where did she go on her first trip?
A. Lorain, Ohio.
Q. How many days after you received orders to go after the cargo which you were to take before she left?
A. I had received letters quite a number of days before that.
Q. About how long?
A. I should say ten days.
Q. What cargo did you take?
A. Steel.
Q. From where?
180 A. Lorain, Ohio.
Q. To what other point?
A. Superior, Wisconsin.
Q. Now, what particular trade was that vessel built for?
A. Iron.
Q. In what way was she built for that trade; describe her?
A. Well, her hatches were made four feet larger fore and aft, and her hatches larger all around, and equipped with hoisting gear, booms and hoisting machinery, engines and everything prepared for that purpose.
Q. When you say steel rails, what kind of iron do you mean—what does it mean, railroad iron, or building material, or what?
A. Railroad iron.
COURT: What we call T rails?
Q. How long are those?
A. Well, they run all the way from 28 to 30.
Q. Feet?
A. Yes, sir.
Q. During the time you were looking after the boat, how much of the time around her?
A. I was there every day, except Sundays.
Q. When did you ship your crew?

A. About two days before we left.
Q. When launched, what letters were on her stern?
A. Winnebago, Michigan City.
Q. About what is the tonnage of the Winnebago?
A. 1,091.
Q. What is her length?
A. 200 feet keel.
Q. Breadth?
A. 39 feet.
Q. Depth?
181 A 16 feet
Q. How many tons does she carry cargo?
A. 1,650 gross tons.
Q. Between what points was your special railroad iron trade?
A. Well, from Conneaut and Lorain on Lake Erie.
Q. In Ohio?
A. Yes, sir.
Q. To where?
A. Superior and Port Williams.
Q. Where is Superior?
A. Wisconsin.
Q. And Port William?
A. In Canada.
Q. Did you receive any information during the time you were there from any one that a lien was to be claimed on the Winnebago?
A. No, sir.
Q. Did you get any notice of any unpaid bills from the Edwards Company?
A. No, sir.
Q. Or any one else?
A. No, sir.

Redirect examination:

A. Did you make any inquiry, captain, of any unpaid bills?
A. No, sir.
Mr. KREMER: You did not order any goods at any time from Kramer & Co.?
A. No, sir.
COURT: Do you know of any of the Edwards goods, whether they went in there or not, or whose goods?
A. No, sir.

182 The testimony of HARRY O. LOVEJOY taken by stipulation, marked Exhibit "G."
Mr. GRAY: It is considered we have exceptions to the testimony objected to.
COURT: Yes, sir.
Direct-examination of Mr. Lovejoy read by Mr. Oakes.
Cross-examination read by Mr. Gray.

Mr. OAKES: We will read into the record the letters marked Exhibit "2."

Mr. GRAY: We object to a number of them because there is not a single mention made of a boat, or the hull of a boat, and we think they are all immaterial and incompetent in that way.

COURT: Do you think it wise to lumber up the record by reading those letters in full? Simply say that the counsel read from 20 letters.

Mr. GRAY: You can have them marked as exhibits, so as to do away with the stenographer taking them.

Twenty letters considered as Exhibit "2."

Plaintiff rests.

ROY M. VAN VLEET, sworn for defendant.

Examined by Mr. KREMER:

Q. Where do you live?

A. Port Huron, Mich.

Q. What is your occupation?

A. Electrical engineer.

Q. In 1902 and 1903, up to the 1st of August, 1903, where were you employed?

A. Columbia Iron Works, St. Clair, Mich.

Q. And in what capacity?

A. I was then electrician.

Q. What experience had you had in the construction
183 of machinery, engines, and different kinds of machinery, prior to that time?

A. I had considerable, general practical experience, also a graduate from the Westinghouse Manufacturing Co. students' course, in Pittsburgh, Pa.

Q. Were you familiar with the construction of engines and electric light plants of such a character as you found at the Columbia Iron Works?

A. Yes, sir.

Q. Now, are you familiar with the manner in which they did business as to the reception and the furnishing of the supplies pertaining to the different parts and ships in the yard?

A. Yes, sir.

Q. Now, how were goods, how were stock goods, not specially designed for a particular purpose, how and where were they received?

A. All small goods went directly to the yard store-room.

Q. And then how were they taken from there to the ships, the places where they were to be used?

A. When the time came for their use, they were obtained from the store-room kept there, either on written or verbal order from the man having charge of that kind or work, and his laborers took them to the point where they were to be utilized.

Q. Did you at any time see goods from the Edwards Co. in the store house, or being received?

A. Yes, sir.
Q. How do you know they were from the Edwards people?
A. Why, the conditions were such usually that I had a good deal to do with the goods coming into the yard, for instance, having charge of the electrical work, I had a good many things
184 looking after my work around the yard, and the goods from the Edwards Company came from the Rapid Railway, and the station would be 100 feet from the store-room, and I frequently went out there and looked over the goods, and sent a man to bring them down to the store room.

Objected to, in so far as it does not relate to the articles shipped by Mr. Eddy, but to general shipments.
COURT: Take it as a part of the general inquiry; note an exception.

Q. Did you know of the reception of sidelights?
A. I cannot say when they came that I know of, but I can tell you they were in the store-room.
Q. How were they labeled or tagged?
A. I do not remember that they were tagged.
Q. Where were they when you saw them?
A. In the store-room.
Q. Now, I will ask you whether, since the departure of the Winnebago from the Columbia Iron Works, you made an examination of the contents of the store-room?
A. Yes, sir, I did; I had charge of the store-room inventory for the Detroit Trust Co.
Q. For the Detroit Trust Co.?
A. Yes, sir.
Q. Did you at that time find any such sidelights as you saw there before the Winnebago left?
A. Yes, sir.
Q. Describe what you saw?
A. I saw in the center of the store-room, at the extreme top, four 10-inch lights.
Q. Did you find any others?
A. No, sir.
Q. Were those sidelights there similar, or were they of the lights that you saw before?
A. Yes, sir.
185 Q. Were they similar to the sidelights you saw the Howard use and the Winnebago?
A. Yes, sir.
Q. Do you know of the reception of mineral wool at the store house?
A. Yes, sir.
Q. Do you know from whom it was received?
A. I do not remember as I do.
Q. Where did it come from?
A. We got that in St. Clair.
Q. From whom?

A. R. S. Jenks.
Q. Do you know what mineral wool, if any, was used in the Winnebago?
A. I know mineral wool was used to pack around the bulkheads, between the cabin and the pilot house, and the cabin and the engine.
Q. Do you know whether Jenks' wool was used there?
A. I know all that was, and perhaps more.
Q. I think that is all.

Cross-examination:

Q. Mr. Van Vleet you did not find any more than these 10-inch lights in the store-room after the failure?
A. Not when I took the inventory.
Q. That is all there were?
A. Yes, sir.
Q. Do you know whether the Howard or Winnebago went away with its full equipment of these sidelights?
A. I think they were all in place in both vessels, although the Howard might have gone without them in place on the boat.
Q. You cannot testify to a certainty on that point?
A. No, sir.

Q. Did you have any knowledge, Mr. Van Vleet, of the
186 receipt of the windlass and capstan for the Winnebago?
A. Yes, sir.

Q. Do you happen to know from whom they came?
A. They were tagged from the American Ship Windlass Co.
Q. Of Providence?
A. Providence, Rhode Island.
Q. And one of those windlasses from that company went into the Winnebago?
A. Yes, sir.
Q. And the capstan the same?
A. Yes, sir.
Q. Do you know how many sidelights were used on the Winnebago?
A. No, sir.

Mr. GRAY: Mr. Jenks is not here; we could not keep him; I think I will have to swear Mr. Kramer.

CHARLES E. KREMER, sworn for defendant.

Examined by Mr. GRAY:

Q. Where is your home?
A. Chicago.
Q. Your profession?
A. I practice law.
Q. Are you interested in any way in the Iroquois Transportation Company?
A. Yes, sir, I am.
Q. In what way?
A. I am president of the company.

Q. Is the Iroquois Transportation Co. a corporation?
A. It is.
Q. Organized under the laws of what state?
A. Of the State of New York.
Q. Where is its residence?
A. Michigan City, Indiana.
187 Q. Were you present at St. Clair or Port Huron, July 18th or July 19th last, when the Winnebago was turned over to the Iroquois Transportation Co.?
A. I was.
Q. Were you present when the final settlement was made with the Columbia Iron Works for her construction?
A. I was.
Q. I hand you a paper marked Exhibit "H;" do you recognize that paper?
A. Yes, sir.
Q. Was that the receipt, given at that time?
A. Yes, sir, that was given to us on July 19th, 1903, by the Columbia Iron Works.
Q. When you say to you, to whom do you have reference?
A. To the Iroquois Transportation Co.
We offer Exhibit "H" in evidence. That receipt was offered yesterday, a receipt of $4,000 being final payment for the steamer Winnebago.
Q. Was there any payment made at the same time to the Columbia Iron Works?
A. Yes, sir, we delivered to them a mortgage on the Winnebago, and 48 $1,000 bonds, negotiable bonds of the Iroquois Transportation Co.
Q. And did the cash payment and these bonds and mortgages you refer to complete the final purchase price of the Winnebago?
A. Yes, sir; on a cash payment amounting to something like $400 or $500, and the remainder of the amount which the receipt covered was $3,500 penalty on the contract, and the interest from the 31st of July, that being the date of the bonds, and the delivery being the 19th, the difference, of course, was deducted.
COURT: What was the price?
A. $95,000.
188 Q. What was the contract price for the Winnebago?
A. $95,000.
Q. In a general way, at what time had the balance of the payments been made?
A. The payments were made according to the contract with them in 1902, excepting the $48,000 and the $4,000.
Q. And then the delivery of these bonds that you refer to in July, 1903, and the final cash payment, and the interest and the demurrage, balanced in full the $95,000 for her construction.
A. That paid the full price of the steamer.
Q. Now, after the settlement of July 19, 1903, has the Iroquois Transportation Co. at any time been indebted to the Columbia Iron Works in any way?

A. No; on the contract the Columbia Iron Works are indebted to the Iroquois Company.
Q. That is all.

Cross-examination:

Q. You were at St. Clair or Port Huron several days before the boat was turned over to your company?
A. Yes, sir.
Q. Who was with you?
A. Mr. Prindeville.
Q. How many days before the boat left?
A. I think two or three days.

Mr. OAKES: Mr. Kremer has been examined with reference to this contract; I just wish it introduced, inasmuch as he has been examined as to the terms of it.
Mr. GRAY: We have not asked him anything as to the terms, merely the purchase price.
Mr. OAKES: I think the contract should be in.
COURT: I think under our rule you would be entitled to it.
This is the contract, is it, for the building of the ship?
189 A. Yes, sir.
Exhibit "16," we offer it in evidence.
Objected to as incompetent and immaterial.
Mr. KREMER: It is offered on cross-examination, too.

Testimony closed.

STATE OF MICHIGAN:

Circuit Court for the County of Wayne.

DE LANEY FORGE & IRON COMPANY, Complainant; GEORGE W. EDWARDS ET AL., Int'g Complainants,
vs.
THE STEAMER "WINNEBAGO."

Testimony of Harry O. Lovejoy, on behalf of complainant, taken by stipulation, to be read in evidence on the trial of the cause, subject to the usual objections as to incompetency and irrelevancy, the same as if taken in open court. The signature of deponent is waived.

By Mr. OAKES:

Q. Mr. Lovejoy, where do you reside?
A. Buffalo.
Q. What is your business?
A. I am a consulting engineer.
Q. Of what concern?
A. The firm of Henry Rice & Company.
Q. In Buffalo?
A. In the City of Buffalo.

Q. You were connected with the Columbia Iron Works, at St. Clair, were you not, in 1902 and 1903?

A. I was.

190 Q. In what capacity?

A. I performed the duties of an assistant superintendent.

Q. And state in a general way what your duties were?

A. Specifically, I had charge of the department known as the mold loft, and subsequently of installing a considerable amount of the auxiliary machinery on the "Winnebago" and "Howard."

Q. And having charge of the mold loft, what knowledge would that give you with reference to the general construction of the ships?

A. It demands a complete knowledge of all structural features, and complete data as to the auxiliary machinery and those fixtures that are necessary to the operation of the ship.

Q. And do you know, Mr. Lovejoy, of the character of the windlass and capstan installed on the "Winnebago"?

A. Yes, sir.

Q. Can you state what it was?

A. The windlass installed in her windlass-room in the forward part of the ship was what is known as "No. 4 Providence." That is, a complete windlass and steam capstan.

Q. And as to the capstan that was installed, speaking now of the other end of the ship, if there was one?

A. At the aft end of the ship there was a steam capstan of the Providence make. It was driven by two steam engines actuating the capstan barrel, through a mediary. This capstan was suspended from the transom beam on the other side of the ship, and was inverted.

Q. How many, Mr. Lovejoy, do you know, of those windlasses or those capstan windlasses, and the capstans aft, were received by the Columbia Iron Works up to the time of or before their failure?

191 A. There were two of those No. 4 machines and two of the capstans.

Q. And on what boats were they installed?

A. There was a windlass and a capstan installed on the "Winnebago," and duplicates on the "John C. Howard."

Q. Did I understand that there were none other received by the company except those two?

A. To my knowledge there were none.

Q. And when you say to your knowledge, do you mean that you would know?

A. I would have known if there had been others.

Q. Mr. Lovejoy, how many brass sidelights, or deadlights, as they are called, to the best of your recollection, were installed on the "Winnebago," and what sizes?

A. To the best of my knowledge, I can account for fourteen ten-inch lights, two twelve-inch lights, and four eight-inch lights. There may have been one more or less of the ten-inch lights in the engine room.

Q. When you say one more or less, do you mean one more or less, or one more or less on a side?

A. On a side.
Q. And how as to the "Howard"?
A. The "Howard's" equipment was an exact duplicate of that on the "Winnebago," except for her cabin furnishings.
Q. From where, or from what concern, if, as assistant superintendent of the yards, you know, were these sidelights received?

Mr. KREMER: I want to object to that unless the witness knows of his own knowledge.
Mr. OAKES: Well, I have asked of his knowledge. Did you know?

A. I knew where they came from from the standpoint of common knowledge that would go with my position that they came from the Edwards concern.

192 Q. Mr. Lovejoy, was there any mineral wool used aboard the "Winnebago"?
A. Yes, sir.
Q. For what was that used?
A. It was used in the walls surrounding the engine trunk in the after cabin.
Q. And the shipment of this wool that was claimed to have been made on May 6th, 1903, if used on a vessel at that yard, would have been used on what boat?
A. On the steamer No. 1, the "Winnebago."
Q. About how much mineral wool was used on the "Winnebago"?

Mr. KREMER: That is objected to as irrelevant.

A. Why, as to that, I cannot say.
Q. Can you approximate it?

(Same objection.)

A. There would probably be several hundred pounds in the wall.
Q. If you know, you may state from whom the mineral wool was received that was used on the "Winnebago"?

Mr. KREMER: That is objected to unless the witness knows of his own knowledge.

A. I do not know.
Q. Did the windlass on the "Winnebago" have friction band hand wheel and attachments?
A. Yes, sir, it did.
Q. And if such an item was furnished at the Columbia yards under date of June 30th, on what ship would it be used?

(Objected to as irrelevant and immaterial.)

A. It would be used on the "Winnebago."
Q. And why do you say that?
A. Because the other ship was not in shape to receive her windlass, and would not be for some time.

193 Mr. KREMER: Is that aside from the charge for the windlass?
Mr. OAKES: It is a small item, aside from that charge.

Cross-examination.

By Mr. KREMER:

Q. Mr. Lovejoy, what did you have to do with the installing of the deadlights?
A. I had nothing to do with the installing of them. I had to know whether they were to be located in the shell of the ship.
Q. You made the drawings for them?
A. No, sir. I was not a draughtsman there. In my loft work I had to know it.
Q. And from your knowledge there you give the number of places where the deadlights were to be?
A. I give that from my records.
Q. Do you know—were deadlights put in the "Winnebago"?
A. Yes, sir.
Q. Who put those in? Were they put in her under your direction or some one else's?
A. They were put in under the direction of a man known as the boss fitter.
Q. Then you did not know anything about where they came from?

Mr. OAKES: I object to that. The witness has stated that he did know.

Q. Did you know?
A. I knew as a matter of common knowledge of my position.
Q. Where did you first see these deadlights?
A. In the store-room.
Q. And did that store-room contain other material?
A. Yes, sir.
194 Q. All kinds of material?
A. All kinds of material.
Q. You saw them in the store-room?
A. Yes, sir.
Q. Did they have any labels on them at that time?
A. They probably did. I didn't notice the labels.
Q. Didn't notice the labels?
A. No, sir.
Q. Did some one tell you where they came from?
A. Yes, sir.
Q. Who told you?
A. The superintendent, Mr. Rice.
Q. And that is the way you knew where they came from?
A. That is the way the information came to me.
Q. And he told you they came from Edwards?
A. He said they came from the Edwards place.
Q. The "Howard" was a little longer ship than the "Winnebago"?
A. Yes, sir.
Q. She used more deadlights than the "Winnebago"?
A. No, sir; she did not.

Q. When you saw the deadlights in the store-room, did you see the deadlights that went into the "Howard" there at the same time?

A. I could not identify them. They were the same for each ship.

Q. Were there enough there for both boats, as you saw them?

A. I could not recall how many there were.

Q. And then your idea was that you saw a number of deadlights, and Mr. Rice told you they came from Edwards?

A. Yes, sir.

Q. You could not tell how many you saw there?

195 A. No, sir.

Q. And you could not tell where they were put, those that you saw?

A. No, sir.

Q. Did you see the windlass and capstan before it was installed?

A. Yes, sir.

Q. Where was that?

A. It was lying in the yard beside a freight car the first time I saw it.

Q. Were there two sets of them there at the same time?

A. I cannot remember whether they were both there at once or not.

Q. You did not know where these came from any different than you did where the deadlights came from, I suppose?

A. Why, my information would be the same in both cases.

Q. The same. The windlass and capstan were sort of standard goods, that were catalogued?

A. Yes, sir.

Q. You had nothing to do with the installing of them?

A. With the installing of the windlass and capstan?

Q. Yes, sir.

A. With the installing of the windlass forward I was interested only to the extent by which that affected the decks above and below, the deck plates. In getting out that material I had to know all about the machine. With the installation of the light capstan aft, I was directly interested, because I had to install the steering gear, and the two interfered. That was put up under my direction.

Redirect examination.

By Mr. OAKES:

Q. How are these deadlights ordered, ordinarily? Are they specially ordered, or ordered ready-made?

196 A. Why, they are ordered from the standard sizes. The customary way is to decide with the owners on what we call the accommodation plans. When that is settled, then the number of the deadlights and the sizes of the deadlights required for a given ship is settled.

Q. And the rim of brass work surrounding the light, is that gauged differently for different thicknesses of plate?

A. The shell flange should be governed by the thickness of the plate that the light is to go through.

Q. Do you know whether, in ordering the sidelights for these vessels, any special order or direction was given as to these lights?
A. No, sir, I do not.
Q. Is it usual, in this business, to keep such things as sidelights in stock, or are they ordered when the accommodation plan is completed?

Mr. KREMER: That is objected to as incompetent and immaterial.

A. In a plant of that size they would be ordered in a lump for each ship.
Q. As needed?
A. As they were needed.
Q. With reference to the windlass and capstan, the same rule would apply.
A. The same rule would apply.

EXHIBIT "2."

DETROIT, MICH., *Feb. 25th*, 1903.

Columbia Iron Works, Port Huron, Mich.

GENTLEMEN: Referring to your order of yesterday for windlass and steam capstan, we have just received a message from the American Ship Windlass Company advising us that they will ship
197 this windlass in about four weeks. We wrote them full particulars about the order instructing them to rush the order all they possibly could. This they will do, and we hope that the delivery which they promise will be satisfactory to you.

Thanking you for your favors, we are,

Yours truly, H. D. EDWARDS & CO.
J. G. A.

DETROIT, MICH., *Feb.* 27, 1903.

Columbia Iron Works, Port Huron, Mich.

GENTLEMEN: Relative to the windlass and steam capstan for the steamer "John C. Howard," which you ordered a few days ago, the American Ship Windlass Co., send us the enclosed blue prints for us to have filled out. Will you kindly fill in the dimensions and return them to them promptly? We presume they wish to have these on file there for record.

In ordering the windlass and capstan we advised the American Ship Windlass Co. that it was to be an exact duplicate in all respects to that furnished for the "Winnebago," all dimensions, etc., to be the same with the exception of the name, which is to be "John C. Howard."

Yours truly, H. D. EDWARDS & CO.
J. G. A.

DETROIT, MICH., *Feb.* 27, 1903.

Columbia Iron Works, Port Huron, Mich.

GENTLEMEN: Since writing you to-day we have received additional information from the American Ship Windlass Co. relative to the windlass and capstan for the "John C. Howard." They now send us blue prints showing the exact dimensions to which they
198 are making the windlass and capstan, and also advise that they are fitting the wildcats to the same chain dimensions as for the other windlass.

If this is not all exactly correct and as you wish please advise promptly.

Yours truly, H. D. EDWARDS & CO.
J. G. A.

(Copy.)

DETROIT, MICH., *March 7th*, 1903.

Columbia Iron Works, Port Huron, Mich.

GENTLEMEN: Will you please send us paid freight bill of the windlass and capstan which we shipped you from Providence. We think the freight excessive and are going to try and get a rebate. If you will kindly send this at once we shall be obliged.

It is not certain that we can get the rebate, but if we do you will have the benefit of it.

Yours truly,
(Signed) H. D. EDWARDS & CO.

PORT HURON, MICH., *Mar. 24th*, '03.

H. D. Edwards & Co., Detroit, Mich.

GENTLEMEN: The windlass and capstan from Providence have just arrived, and in accordance with your letter of the 7th inst. we enclose you freight bill covering the same.

We trust you will be successful in getting the rebate.

Yours truly, COLUMBIA IRON WORKS.

199 (Copy.)

DETROIT, MICH., *March 30th*, 1903.

Columbia Iron Works, Port Huron, Mich.

GENTLEMEN: Referring to your order for side lights and emery wheel given to our Mr. Hamilton, as explained on the 'phone, we will hurry these lights to you with least possible delay. We expect to be able to ship 4 of the 8" and 10 of the 10" by Friday next at the latest. The balance we will hurry all we can.

As explained on the 'phone, the price quoted you by Mr. Hamilton on the 8" light is lower than we can sell the Roung frame light for steel boats. We will ship all of the lights at the prices quoted

by Mr. Hamilton, but on future orders for the 8" size we would have to get a higher price.

Will you please advise us by return mail the thickness of the steel where these lights are to be used. If you will do so we will have the frames on the lights trimmed to the proper thickness so it will save trimming after they are put in.

Thanking you kindly for the favor, we are,

Yours truly,

(Signed) H. D. EDWARDS & CO.
J. G. A.

PORT HURON, MICH., *Mar. 31st*, '03.

H. D. Edwards & Co., Detroit, Michigan.

GENTLEMEN: In reply to your letter of March the 30th, relative to our order for lights given your Mr. Hamilton.

The thickness of the steel where these lights are to be used will be the ordinary size or about three-eighths.

Yours truly, COLUMBIA IRON WORKS.

200 EXHIBIT "3."

DETROIT, MICH., *Apr.* 4, 1903.

Received from H. D. Edwards & Company, Rapid Railway, marked Columbia Iron Works, St. Clair, Mich., 3 barrels glass side lights.

(S'g'd) (Rubber Stamp,)
Receipt for Express only,

A. R. PATTERSON.

EXHIBIT "4."

DETROIT, MICH., 5/6, 1903.

Received from H. D. Edwards & Company, Rapid Railway, marked Columbia Iron Works, St. Clair, Mich., 12 bags mineral wool.

(S'g'd) (Rubber Stamp,)
Receipt for Express only,

A. R. PATTERSON.

EXHIBIT "5."

DETROIT, MICH., *Apr.* 27, 1903.

Received from H. D. Edwards & Company, Rapid Railway, marked Columbia Iron Works, St. Clair, Mich., 3 barrels glass side lights.

(S'g'd) (Rubber Stamp,)
Receipt for Express only,

A. R. PATTERSON.

EXHIBIT "6."

DETROIT, MICH., *June 1st*, 1903.

Received from H. D. Edwards & Company, Rapid Railway, marked Columbia Iron Works, St. Clair, Mich., 1 box glass.
(S'gn'd, Rubber Stamp)
Receipt for Express only,

P. I. D., *Agent.*

Exhibit A.
Enrollment. See Ex. 13 in Delaney case.

Exhibit B.
License. See Ex. 14 in Delaney case,

Exhibit C.
Bill of Sale. See Ex. 15 in Delaney case.

201 Exhibit D.
Agreement as to Possession. See Ex. 18 in Delaney case.

Exhibits E and F.
Notices of Claims. See Exs. 11 and 12 in Delaney case.

Exhibit H.
Receipt. See Ex. 17 in Delaney case.

Exhibit 16.
Contract. See Ex. 16 in Delaney case.

202 STATE OF MICHIGAN:

The Supreme Court of the State of Michigan.

DEALANEY FORGE & IRON COMPANY, Complainant & Appellee,
vs.
"WINNEBAGO," THE IROQUOIS TRANSPORTATION COMPANY, Claimant & Appellant.

Motion to Amend.

And now comes the claimant and appellant in the above entitled suit, by Gray & Gray, its attorneys, and moves the Court to amend its answer heretofore filed in this cause, by adding thereto the following paragraph to be inserted in said answer as paragraph 18½:

"18½: That if it be held and determined under the facts and circumstances surrounding the construction of said steamer Winnebago, that prior to July 18th, 1903, this claimant was not the legal owner of said vessel, that then and in that event this claimant was became a *bona fide* purchaser of said steamer on said date from the said Columbia Iron Works without notice of complainant's claim;

and that thereafter and at the time of the filing of the complaint in this cause, said steamer was in the possession of this claimant as such purchaser and that the complaint filed in this cause is therefore null and void for the reason that complainant does not and did not reside in said County of Wayne (being the county wherein said complaint was filed), and that such complaints under said Act can only be filed in the proper courts in the County where complainant resides under such circumstances; and this claimant *cal*ims the same benefit thereof as if it had demurred to said complaint for the reasons therein stated.

GRAY & GRAY,
Attorneys for Claimant and Appellant.

(Endorsed:) Filed Aug. 16, 1904. Chas C. Hopkins, Clerk Supreme Court.

203 STATE OF MICHIGAN:

The Supreme Court of the State of Michigan.

GEORGE W. EDWARDS ET AL., Intervening Complainant,
vs.
STEAMER "WINNEBAGO."

Motion to Amend.

And now comes the claimant and appellant in the above entitled suit by Gray & Gray, its attorneys, and moves the Court to amend its answer heretofore filed in this cause, by adding thereto the following paragraph to be known as 18½:

"18½: That if it be held and determined under the facts and circumstances surrounding the construction of said steamer "Winnebago," that prior to July 18th, 1903, this claimant was not the legal owner of said vessel, that then and in that event, this claimant was and became a *bona fide* purchaser of said steamer on said date from the said Columbia Iron Works without notice of intervening complainant's claim; and that thereafter and at the time of the filing of the complaint in this cause and the intervening complaint in this cause, said steamer was in the possession of this claimant as such purchaser, and that the complaint filed in this cause is therefore null and void for the reason that the complainant does not and did not reside in said County of Wayne (being the County wherein said complaint was filed), and that such complaints under said act can only be filed in the proper courts in the county where complainant resides under such circumstances; and the complaint being improperly filed in said Circuit Court for the County of Wayne, that the intervening complaint would fall with it; and this claimant claims the same benefit thereof as if it had demurred to said intervening complaint for the reasons herein stated.

GRAY & GRAY,
Attorneys for Complainant and Appellant.

(Endorsed:) Filed Aug. 16, 1904, Chas. C. Hopkins, Clerk Supreme Court.

204 STATE OF MICHIGAN:

Supreme Court.

DE LANEY FORGE & IRON COMPANY, Complainant-Appellee; GEORGE W. EDWARDS ET AL., Intervening Complainants-Appellees,
vs.
STEAMER "WINNEBAGO," IROQUOIS TRANSPORTATION COMPANY, Claimant and Appellant.

Appeal from Wayne Circuit Court.

Brief in Opposition to Motion to Amend Answers of Claimant-Appellant.

As preliminary to our Brief in Opposition to Motion to Amend Answers here, we only wish to refer to one or two statements of fact, to be read in connection with the short statement of facts in the brief on behalf of Motion to Amend, filed by claimant and appellant.

In the first place, the action was commenced for the purpose of recovering certain amounts claimed to be due to the complainant, not from the Columbia Iron Works, but for materials furnished on the order of the Columbia Iron Works and used in the building of the ship "Winnebago;" that these proceedings were begun subsequent to the delivery of the steamer to the claimant, but that the steamer was delivered to the claimant before her completion; that the Columbia Iron Works has failed; and that a common-law assignment, showing a deplorable condition of its finances, was made within ten days or two weeks after the ship "Winnebago" was hurriedly turned over to the claimant by the builders.

205 The principal case, and the case of the intervenors, George W. Edwards, *et al.*, against the "Winnebago," both went to judgment in the Circuit Court without any request being made by claimant (appellant here) to allow its answers to be amended. It is only after the perfecting of its appeal, and after the case is in the Supreme Court, that any suggestion of an amendment is made. Appellant now comes forward and asks that it be allowed to set up specifically in its answers, and before the hearing in this Court, a new defense, one not referred to in its answer now before the Court, and not alluded to in any way in the trial in the Circuit Court. Counsel's first reason for urging this motion seems to be on the claimed ground that "the profession generally is not familiar with the provisions of the Act, and the practice under the same."

Counsel's second reason seems to be that because Sec. 10,825, Mich. Comp. Laws of 1897, allows the taking of testimony after the appeal is perfected and for use in the hearing in the Supreme Court, the privilege of making new and different causes of action or defenses in the pleadings after the appeal, was also intended to have been given by the Act.

We do not think that is the proper construction of the Act. Section 10,825 must be considered in connection with Sec. 10,824.

Section 10,824 provides: "Upon such appeal being perfected it shall be the duty of the clerk to *prepare a transcript of the pleadings and judgment or decree of the Court below, and send up the same,* together with any original depositions taken in the case within twenty days thereafter." Then Sec. 10,825 follows: "The hearing in the Supreme Court shall be *de novo* upon *such transcript and depositions and further testimony,*" etc. The language of the Act is plain. The hearing in the Supreme Court shall be upon the pleadings *as they were in the Court below,* with such testimony on the issues
206 made in the pleadings below as the parties desire. There is no intent in this Act to have the Supreme Court try any different case than was before the Court below. Without any such intent in the Act, we submit the motion to amend is not properly before this Court.

Secs. 10,824 and 10,825 say that the pleadings *as they stood in the Court below shall be used in the Supreme Court.* These same two sections say *impliedly* that the pleadings shall not be amended, by providing expressly for the use of such further *testimony* as the parties may desire, without giving the parties the right to further *pleadings.* As the Act says: "The hearing shall be *de novo* upon *such transcript,*" (the pleadings below) "and such further testimony," etc.

Aside from the clear intent of the Legislature, in Secs. 10,824 and 10,825, to have the Supreme Court hear only the issues raised by the pleadings in the Court below, we submit that, having delayed this application to amend until after judgment had been entered in the cause, the appellant is here asking this Court to do something beyond its authority.

Section 10,268, Mich. Comp. Laws, 1897, provides:

"The Court in which any action shall be pending, shall have power to amend any process, pleading or proceeding in such action, either in form or substance, for the furtherance of justice, on such terms as shall be just, at any time before judgment therein."

And judgment has been already entered in this action.

Then, again, there is the further objection to the amendment offered here that it would not be in furtherance of justice. On the contrary, if there were any merit in the defense which it is proposed to have added to the answers, the allowing of the motion to amend would allow appellant to profit by his wrongful delay. In other words, if the additional defense now offered had been timely set up by claimant, complainant would have had ample opportunity to have
207 overcome it had complainant desired to do so. Now the year prescribed by Sec. 10,832 (under which claimant now comes forward and asks rights) has expired, and if there were any force to the new defense offered, complainant could not now overcome it, where had it been timely set up, complainant could have brought itself within the statute had it so desired. Complainant's claim accrued in July, 1903, (Record 6 & 7), under Sec. 10,832, complainant would have had until July, 1904, to file its claim in the County of its residence. If complainant had had any notice that claimant intended to raise the defense it now seeks to bring forward,

the defense offered could, up to July, 1904, have been easily brushed aside. Now, on August 15th, just after the year has expired, and when, if the defense really had any force or merit, it would be too late to overcome it, it is brought forward by the claimant. It is plain that, if there were no other reasons for not granting the motion, the fact that *if it has any force* it would tend to *thwart,* rather than *further,* justice, would be sufficient reason for the denying of the motion.

SHAW, WARREN, CADY & OAKES,
Attorneys for Complainant and Intervening Complainants-Appellees.

Union Trust B'ld'g, Detroit, Mich.

(Endorsed:) Filed Sept. 21, 1904. Chas. C. Hopkins, Clerk Supreme Court.

208 At the Session of the Supreme Court of the State of Michigan, Held at the Supreme Court Room, in the Capitol, in the City of Lansing, on the eighth day of October in the year of our Lord one thousand nine hundred and four.

Present, the Honorable Joseph B. Moore, Chief Justice. William L. Carpenter, Claudius B. Grant, Robert M. Montgomery, Frank A. Hooker, Associate Justices.

DELANEY FORGE & IRON COMPANY
vs.
STEAMER WINNEBAGO.

In this cause motions to amend the answers of the claimants are duly submitted, and the Court having considered the same, the motions are denied with costs to the complainant.

209 At a Session of the Supreme Court of the State of Michigan. Held at the Supreme Court Room, in the Capitol, in the City of Lansing, on the fourteenth day of April in the year of our Lord one thousand nine hundred and five.

Present, the Honorable Joseph B. Moore, Chief Justice; William L. Carpenter, Aaron V. McAlvay, Claudius B. Grant, Charles A. Blair, Robert M. Montgomery, Russell C. Ostrander, Frank A. Hooker, Associate Justices.

No. 20627.

DELANEY FORGE AND IRON COMPANY, Complainant,
vs.
THE STEAMER "WINNEBAGO," Defendant.

This cause coming on to be heard is duly submitted upon briefs.

210 Supreme Court of Michigan.

Opinion.

DELANEY FORGE AND IRON CO., Compl't; GEORGE W. EDWARDS ET AL., Intervening Compl'ts,
vs.
THE STMR. WINNEBAGO, IROQUOIS TRANSPORTATION CO., Claimant and Appl't.

Before Moore, C. J.; Carpenter, McAlvay, Ostrander, Hooker, JJ.

McALVAY, *J.:*

The Delaney Forge and Iron Company of Buffalo, New York, brought this proceeding under Sec. 10789 C. L. 1897, against the Steamer "Winnebago," claiming a lien for materials furnished for use in and about the construction of the said Steamer. George W. Edwards *et al.*, are intervening complainants claiming a similar lien. The Iroquois Transportation Company, an Indiana corporation, is owner and claimant of the vessel.

This Steamer was constructed and built by the Columbia Iron Works in their shipyard at St. Clair, Michigan, under a contract dated March 8, 1902. The contract price was $95,000, and the Columbia Iron Works was to furnish all material and labor necessary to completely construct said Steamer, and deliver the same at Port Huron Mich. on or before October 1, 1902. Of the contract price $31,000 was to be paid in cash from time to time. This contract was made with John J. Boland and Thos. J. Prindi-
211 ville, and contained a provision that they, with other stockholders, would organize a corporation to be known as "The Iroquois Transportation Company," which, for the balance of the purchase price, would execute its notes to the amount of $16,000, and issue bonds for $48,000 to be secured by mortgage upon its property. The corporation was duly organized and the notes, bonds and mortgage executed and delivered as agreed. It was understood that this corporation would ultimately be the owner of the Steamer. Boland and Prindiville assigned the contract to this corporation April 5th, 1903. Under the contract the Columbia Iron Works proceeded with the construction of the steamer. It was launched March 21, 1903, and after it was in the water the work under contract continued. On July 18, 1903, it was inspected, measured, enrolled and licensed to be employed in domestic and foreign trade. Said

enrollment and license were issued to C. I. Works as owner. The same date an agreement was made giving conditional possession to claimant corporation, the Iroquois Transportation Company, "for the purpose of completing and finishing up those things still remaining undone upon said Steamer, and required to be done by said Iron Works by the terms of the contract for the construction of said steamer"—"It being the sole intent and purpose of this agreement to enable the Iroquois Transportation Company to obtain immediate possession of this steamer, and without intending either to limit the extent of the obligation of said Columbia Iron Works under the original specifications."

Final cash payment on the contract was made July 19, 1903 when the Columbia Iron Works had received the full contract price in cash, bonds and mortgage, less $3500 deducted as penalty provided in the contract for non-completion of the boat within the time stipulated. On this last date a bill of sale of the steamer was made
212 by the Columbia Iron Works to the Iroquois Transportation Company.

The claims for which liens are here sought by complainant to be enforced, are for materials furnished to enter into and be used in the original construction and building of said Steamer Winnebago. The materials furnished by complainant were steel forgings supplied according to the specifications and drawings furnished, between Nov. 24, 1902 and July 16, 1903, as from time to time ordered by the Columbia Iron Works, upon the purchase price of which a balance of $1,999.90 is claimed. The complaint was filed Oct. 6, 1903, in the Circuit Court for Wayne County. The Iroquois Transportation Company filed a bond, entered an appearance, and answered. The cause was heard and a judgment rendered in favor of Complainant for the full amount and costs against the Iroquois Transportation Co., claimant and owner of said steamer, and the United States Fidelity and Guaranty Company of Baltimore, Maryland, its surety upon the bond furnished as provided by statute. Both parties against whom said judgment was rendered have appealed to this Court, and by stipulation the cause is heard upon the testimony taken in the Circuit Court and returned to this Court.

The first question to determine is whether the Michigan Statute under which this proceeding was brought is in contravention of the Constitution of the United States. If the case is one within the admiralty and maritime jurisdiction there is no question but that a Federal Court would alone have jurisdiction, notwithstanding the fact that the State Statute in terms provided a remedy. By the constitution the judicial powers of the United States extends to all causes of admiralty or maritime jurisdiction. The judiciary Act of 1789 saves to suitors in all such cases the right of a common law remedy where the common law is competent to give it and declares
213 that with this exception, the Federal jurisdiction is exclusive.

This then would give the Federal Courts exclusive jurisdiction as to the enforcement of all liens in respect to maritime contracts or maritime torts. If the lien sought to be enforced arises under a non-maritime contract and is created by a State statute the

authorities hold that the State Courts have jurisdiction. Contracts for the building of ships or for furnishing materials for their construction are held by the Federal Courts to be non-maritime contracts, and therefore not within the jurisdiction of admiralty Courts, and liens arising under State laws out of such contracts may be enforced in the State Courts.

Johnson *vs.* Chicago etc. Elevator Co. 119 U. S. 388.
Knapp, Stout & Co., *vs.* McCaffrey, 177 U. S. 638.
The Robert W. Parsons 191 U. S. 17.
The Jas. B. Ketchum 97 Fed. R. 872.
The Jefferson 22 How. 129.
Edwards *vs.* Elliott 21 Wall. 532.

It will be observed that while the authorities are uniform in holding that the jurisdiction of the Federal Courts is exclusive in proceedings *in rem* arising under maritime contracts, the decisions of the State and Federal Courts are just as uniform in holding that such proceedings provided for by State statutes, arising under non-maritime contracts are within the jurisdiction of the State Courts.

We find from proofs in the case at bar that the materials furnished were for the Steamer Winnebago and actually went into the original construction of the same, as contemplated by the original plans and specifications. The Michigan Statute in so far as it creates a lien for materials so furnished, and provides for the enforcement of such lien, does not contravene the Constitution of the United States.

214 All the decisions make a clear distinction between those cases where the lien is for the materials furnished for the building and construction of a vessel, and where the same is furnished for repairs to a vessel.

The record shows that of these materials furnished by complainant all but four items were furnished before the date of the launching, March 21, 1903, and that these four items, one quadrant, three steel valve stems, three steel connecting rod caps, and one tiller, were furnished April 30, and July 16, 1903. These named items from their description, and the evidence, were necessary in the construction of the steamer. As is customary the vessel was put into the water before its construction was entirely completed, and the work continued at least until July 18, 1903. The items were all furnished before the steamer was completed, and before she was enrolled and licensed, and were properly included in complainant's claim.

The claim is made that the statute applies only to vessels intended to be used *exclusively* in navigating the waters of the State. One provision of Section 10789 C. L. 1897, is, "Every water craft of above five tons burthen, used, or intended to be used in navigating the waters of this State, shall be subject to a lien thereon. First for all debts contracted by the owner or part owner, master, clerk, agent, or steward of such craft—on account of materials furnished—in or about the building of such craft."

The Steamer Winnebago was built in the State of Michigan. The materials furnished in this case were furnished in its construction before enrollment and license. The vessel was licensed July 18,

1903, "To carry on the Coasting and Foreign trade on the Northern, Northeastern, and Northwestern frontier, otherwise than by sea for one year." From the license itself it appears that the Steamer
215 was intended to be used as well in the waters of this State as other States. From the proofs it appears that the Steamer was actually engaged in navigating the waters of this State, although also engaged in interstate commerce and trading with Canadian ports, as under the license was permissible.

This Court has passed upon this question and construed this statute in this regard in Brig City of Erie *vs.* Canfield, 27 Mich. 481, in an opinion written by Judge Cooley, holding, "The fact that the brig was upon a voyage from a port outside the State seems to me unimportant except as it may bear upon the question of admiralty jurisdiction. The act referred to was unquestionably intended to give a remedy in all cases coming within its provisions in other particulars, where the vessel was at the time navigating the waters of the State, and where no remedy could be had in admiralty. The act is not confined to the water craft used or intended to be used exclusively in navigating the waters of this State, and the brig in question was in this particular strictly within the terms of the act, and if there is no admiralty jurisdiction, is within the reason for its enactment, not withstanding a part of its voyage was upon the waters of another State."

The claim is made that under the Statute, the complainant being a subcontractor, cannot recover, for the reason that nothing was due from the owner when notice was given.

Under the facts in the case this contention cannot be sustained. Complainant was not a subcontractor. The materials were furnished to the Columbia Iron Works, owner of the Steamer Winnebago. This ownership continued until delivery of the vessel to the Iroquois Transportation Co.

The John B. Ketchum 97 Fed. R. 872.

216 During the time these materials were furnished by Complainant for the Steamer Winnebago, the Columbia Iron Works was engaged in building several vessels at its yards, and Complainant was furnishing a large amount of material for the construction of these vessels, the aggregate value of such materials, in June 1903, being about $9000. The items were all charged in the account of the Columbia Iron Works, the entries showing to which vessel each item applied. A separate account was not kept with each vessel.

A note of $5000 was sent to Complainant by Columbia Iron Works, June 23, 1903. It was received by Complainant. Before it became due the Columbia Iron Works made an assignment and the note was not paid.

The claim is made that these materials were not furnished with reference to a statutory lien upon the vessel, but upon the credit of the Columbia Iron Works, and that the $5000 note was accepted in payment of the claim now sought to be enforced.

The distinction betweeen maritime and non-maritime liens must not be overlooked in this case. It cannot with accuracy be said

that materials, furnished, as in this case where a statute of a State gives a non-maritime lien, are furnished upon the credit of the vessel. Such language is only exact where reference is had to a maritime lien.

The statutory lien attaches by operation of law, where the materials furnished are within the provisions of the statute. The lien attaches as an incident to the contract, and unless such lien is waived the provisions of the statute may be invoked for its enforcement. It is well settled that the giving of a promissory note is no payment of an indebtedness unless it is agreed that it is so accepted, and the evidence to establish payment must be positive and satisfactory. The facts with reference to the taking of the note
217 in this case do not show any such agreement or understanding between the parties. The acceptance of the note was therefore not a payment of the claim.

Gardner *vs.* Gorham 1 Doug. (Mich.) 507.
Peter *vs.* Beverly 10 Peters. (U. S.) 568.
Sarmiento *vs.* The Catherine C. 110 Mich. 120.

The remaining question to consider is whether the proceedings are void and in conflict with the Federal Constitution and Statutes because commenced after the vessel was enrolled and licensed, and engaged in interstate commerce, it being claimed that no seizure could be made while so engaged although within State jurisdiction.

It will not be disputed that the Federal Courts do not assume jurisdiction in admiralty in disputes arising from non-maritime contracts; nor will it be disputed that contracts for building ships are not maritime contracts, and cannot be the subject of litigation in admiralty. It is not sought in the case at bar to enforce payment for any material other than that which went into the building of this steamer, nor which was contracted for or furnished after the vessel was enrolled and licensed.

The State is not usurping the Federal authority in enacting laws relative to matters entirely without the jurisdiction of the Federal Courts, nor will the enforcement of such laws be an interference with the exclusive jurisdiction of such Courts over all admiralty and maritime causes. If it is true that because a vessel is enrolled and licensed, and may be engaged in commerce between States, it cannot be reached in proceedings brought to enforce liens lawfully created by the State authority, then the enforcement of rights under such authority is practically denied.

The question to be determined in each case is whether the State had the power to make the law under which the proceeding is instituted. If such power existed, vessels of the United States
218 may be subjected to process issued from State Courts to enforce a valid lien in proceedings under such law. In this respect the law of the State is valid, and the proceedings taken under it regular.

Our conclusion and judgment, under the evidence submitted upon this hearing, is that Complainant recover judgment in the same amount recovered in the Court below. The cases of Complainant

and intervenors were submitted together as the same questions were involved.

Since writing the foregoing opinion a case involving the same questions under this Statute, brought in the Wayne County Circuit Court, to recover for materials furnished in constructing the Steamer Winnebago, and removed to the United States Court, has been decided in the United States Circuit Court of Appeals for the Sixth Circuit, to which reference is has as further authority for the conclusions herein expressed. The case is not yet reported.

Iroquois Transportation Co. *vs.* A. Harvey's Sons Mfg. Co. U. S. C. C. A.

The judgments of the Circuit Court are affirmed in these cases against both appellants, with costs of both courts, and this order will be certified to the said Court, where judgments will be entered accordingly against such appellants and against all principals and sureties in any bond or bonds filed by them in said causes, as provided by law.

[Seal of the Supreme Court of Michigan, Lansing.]

(Signed) AARON V. McALVAY,
JOSEPH B. MOORE,
R. M. MONTGOMERY,
FRANK A. HOOKER,
RUSSELL C. OSTRANDER.

(Endorsed:) Filed Dec. 4, 1905. Chas. C. Hopkins, Clerk Supreme Court.

219 At a Session of the Supreme Court of the State of Michigan.

Held at the Supreme Court Room, in the Capitol, in the City of Lansing, on the fifteenth day of December in the year of our Lord one thousand nine hundred and five.

Present, the Honorable Joseph B. Moore, Chief Justice; William L. Carpenter, Aaron V. McAlvay, Claudius B. Grant, Charles A. Blair, Robert M. Montgomery, Russell C. Ostrander, Frank A. Hooker, Associate Justices.

DELANEY FORGE AND IRON COMPANY, Complainant,
vs.
THE STEAMER WINNEBAGO; IROQUOIS TRANSPORTATION COMPANY, Claimant and Appellant.

In the Matter of GEORGE W. EDWARDS ET AL., Intervening Complainants.

Upon reading and filing the opinion of this Court in the above entitled cause, and on motion of Shaw, Warren, Cady & Oakes, Attorneys for said Intervening complainants, It is ordered that the judgment of the Circuit Court is affirmed as to said intervenors, and that judgment be entered accordingly, in favor of George W. Edwards, *et al.*, Intervening Complainants, against the Iroquois Trans-

portation Company, The United States Fidelity & Guaranty Company, of Baltimore, Maryland, and Thomas J. Prindiville, for the amounts recovered in the Court below by said Intervenors, together with costs of the Circuit Court as there taxed, and costs of this Court, taxed at Thirty-nine Dollars, with interest on all of said sums.

220 At a Session of the Supreme Court of the State of Michigan. Held at the Supreme Court Room, in the Capitol, in the City of Lansing, on the fifteenth day of December in the year of our Lord one thousand nine hundred and five.

Present, the Honorable Joseph B. Moore, Chief Justice; William L. Carpenter, Aaron V. McAlvay, Claudius B. Grant, Charles A. Blair, Robert M. Montgomery, Russell C. Ostrander, Frank A. Hooker, Associate Justices.

DELANEY FORGE AND IRON COMPANY, Complainant,
vs.
THE STEAMER WINNEBAGO; IROQUOIS TRANSPORTATION COMPANY, Claimant and Appellant.

Upon reading and filing the opinion of this Court in the above entitled cause, and on motion of Shaw, Warren, Cady & Oakes, Attorneys for complainant, It is ordered that the judgment of the Circuit Court is affirmed as to said complainant, and that judgment be entered accordingly, in favor of complainant, against the Iroquois Transportation Company, The United States Fidelity & Guaranty Company of Baltimore, Maryland, and Thomas J. Prindiville, for the amounts recovered in the Court below by said complainant, together with costs of the Circuit Court as there taxed, and costs of this Court, taxed at Thirty-five and 75/100 Dollars, with interest on all of said sums.

221 In the Supreme Court of Michigan.

DELANEY FORGE & IRON COMPANY, Complainant; GEORGE W. EDWARDS ET AL., Intervening Complainants,
vs.
STEAMER WINNEBAGO; IROQUOIS TRANSPORTATION COMPANY, Claimant.

Petition for Writ of Error.

And now comes the Iroquois Transportation Company, the above named claimant of the Steamer Winnebago, by its attorneys, Charles E. Kremer and W. T. Gray, and alleges that in the above entitled cause on the 4th day of December, 1905, final judgment was rendered against your petitioner by the Supreme Court of the State of Michigan, that being the highest court of law or equity, wherein it was adjudged that Section 10789 Compiled Laws of the State of Michigan, 1897, created a lien upon the Steamer Winnebago for supplies and

material furnished in her construction and equipment, both before and after she was launched in the St. Clair River, and that under the said acts the Sheriff of the County of Wayne, in said State, had a right to seize the said Steamer Winnebago under a writ of attachment issued from the Circuit Court of Wayne County in a proceeding *in rem* against the said Steamer Winnebago, and also holding that the said acts of the legislature of the State of Michigan did not controvene the Constitution of the United States and the Acts of Congress made thereunder, or the maritime law of the United States, and held that the said Acts and Statutes of the State of Michigan were valid.

Petitioner further alleges that the said Acts of the said State Legislature were drawn into question and that it was necessary
222 for the said Court in determining the issues in said cause, to decide upon the validity of the said statutes and whether or not they were in conflict or controvention of the Constitution of the United States, the Acts of Congress made thereunder, and the maritime law of the United States, and that the said decision of said Court was manifest error, to the great damage of your petitioner.

Petitioner further alleges that it applied to the Chief Justice of the Supreme Court of the State of Michigan and presented to the said Chief Justice a proper petition for a writ of error in form and manner as provided by the laws of the United States, and that the said Chief Justice then and there declined and refused to issue the said writ, but without prejudice.

Wherefore, petitioner prays for the allowance of a writ of error from the Supreme Court of the United States to the Supreme Court of the State of Michigan, to the end that the record in the said matter may be removed into the Supreme Court of the United States, and the errors complained of by your petitioner may be examined and corrected and said judgment reversed and the said Steamer discharged.

IROQUOIS TRANSPORTATION CO.,
By CHARLES E. KREMER, *Pres't.*

CHARLES E. KREMER,
W. T. GRAY,
Attorneys.

The writ of error prayed for in the foregoing petition is hereby allowed this 17th day of January, 1906, the writ of error to act as a supersedeas and the bond for that purpose is fixed in the case of the Delaney Forge & Iron Company at Five Hundred Dollars ($500.00), and in the case of George W. Edwards, *et al.* at Five Hundred Dollars ($500.00).

JOHN M. HARLAN,
Asso. Justice of the Supreme Court.

223 UNITED STATES OF AMERICA, *ss:*

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the Honorable the Judges of the Supreme Court of the State of Michigan, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Supreme Court before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between Iroquois Transportation Company, Claimant of the Steamer "Winnebago" &c., and United States Fidelity & Guaranty Company of Baltimore, Maryland, Surety, appellants, and De Laney Forge & Iron Company, appellee, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity; or wherein was drawn in question the construction of a clause of the Constitution, or of
224 a treaty, or statute of, or commission held under the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission; a manifest error hath happened to the great damage of the said Iroquois Transportation Company, Claimant of the Steamer "Winnebago," &c. as by its complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within 30 days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the twenty-ninth day of January, in the year of our Lord one thousand nine hundred and six.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

Allowed by
JOHN M. HARLAN,
Associate Justice of the
Supreme Court of the United States.

To the Supreme Court of the United States:

The execution of the within Writ appears by the transcript of record hereto annexed.

[Seal of the Supreme Court of Michigan, Lansing.]

CHAS. C. HOPKINS,
Clerk Supreme Court of the State of Michigan.

Dated Feb. 27, 1906.

225 Know all men by these presents, That we, the Iroquois Transportation Company, as principal, and Bankers Surety Company, as sureties, are held and firmly bound unto Delaney Forge and Iron Company in the full and just sum of five hundred dollars to be paid to the said Delaney Forge and Iron Company, its certain attorney, execitors, administrators, or assigns: to which payment, well and truly to be made, we bind ourselves, our heirs executors and administrators, jointly and severally by these presents.

Sealed with our seals and dated this 24th day of January, in the year of our Lord one thousand nine hundred and six.

Whereas, lately at a term of the Supreme Court of Michigan in a suit depending in said court between the Delaney Forge and Iron Company and the Steamer Winnebago, Iroquois Transportation Company, claimant, a judgment was rendered against the said Steamer Winnebago and Iroquois Transportation Company, as claimant, and the said Iroquois Transportation Company having obtained a Writ of Error and filed a copy thereof in the Clerk's Office of the said Court to reverse the judgment in the aforesaid suit, and a citation directed to the said Delaney Forge and Iron Company citing and admonishing it to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date thereof.

Now the condition of the above obligation is such, that if the said Iroquois Transportation Company shall prosecute its writ of error to effect, and answer all damages and costs if it fail to make its plea good, then the above obligation to be void; else to remain in full force and virtue.

IROQUOIS TRANSPORTATION CO., [SEAL.]
By C. E. KREMER, *Pres't.*
THE BANKERS SURETY CO.
JOHN H. HUME, *Attorney in Fact.*
GEORGE K. THOMAS, *Att'y in Fact.*

Attest,
THOMAS J. PRINDIVILLE, *Secretary.*

Approved by
JOHN M. HARLAN,
Associate Justice Supreme
Court of the United States.

226 In the District Court of the United States for the Northern District of Illinois.

I, T. C. MacMillan, Clerk of the District Court of the United States for the Northern District of Illinois, do hereby certify that the Bankers Surety Company, the surety on the annexed bond of the Iroquois Transportation Co., is sufficient security for the sum of five hundred dollars, the penalty of said bond.

In testimony whereof I have hereunto set my hand and affixed the seal of said Court at my office in Chicago, this January 26, A. D. 1906.

[SEAL.] T. C. MACMILLAN, *Clerk.*

Endorsed: Filed Feb. 6, 1906 Chas. C. Hopkins, Clerk.

227 UNITED STATES OF AMERICA, *ss:*

To De Laney Forge & Iron Company, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to a writ of error, filed in the Clerk's Office of the Supreme Court of the State of Michigan wherein Iroquois Transportation Company, Claimant of the Steamer "Winnebago," &c., is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable John M. Harlan, Associate Justice of the Supreme Court of the United States, this twenty-ninth day of January, in the year of our Lord one thousand nine hundred and six.

JOHN M. HARLAN,
Associate Justice of the Supreme Court of the United States.

Service of a copy of the above admitted.
JOHN C. SHAW,
Counsel for Defendant in Error.

228 In the Supreme Court of Michigan.

DELANEY FORGE & IRON COMPANY, Complainant; GEORGE W. EDWARDS ET AL., Intervening Complainants,
vs.
STEAMER WINNEBAGO, IROQUOIS TRANSPORTATION COMPANY, Complainant.

Assignments of Error.

The Iroquois Transportation Company, the claimant of the Steamer Winnebago in the above entitled cause, in this suit, in con-

nection with its petition for a writ of error, makes the following assignment of errors, which it avers occurred upon the trial of the case of the Delaney Forge & Iron Company, to wit:

1st: That the Supreme Court of Michigan erred in holding that a contract to build a ship to be used or intended to be used in interstate commerce upon the Great Lakes, is not, under the maritime laws of the United States, a maritime contract.

2nd: That the Court erred in holding that the contract for supplies and materials furnished in completing the construction and equipment of the said Steamer Winnebago, after she was launched and afloat in the St. Clair River, was, under the maritime law of the United States, not a maritime contract.

3rd: That the Court erred in holding that the State Courts of Michigan had jurisdiction and a right to enforce a lien under the laws of the State of Michigan, arising on contracts for supplies and material furnished in the construction of a vessel built and to be used in interstate commerce by a proceeding *in rem.* against the Steamer Winnebago, as is provided by the laws of Michigan, and as was done in this suit after the said Steamer had been launched and was afloat in the St. Clair River.

229 4th: That the Court erred in holding that the Courts of Michigan had jurisdiction and a right to enforce liens, under the laws of the State of Michigan, in contracts for furnishing materials and supplies to a Steamer built and intended to be used in interstate commerce by a proceeding *in rem.* against the Steamer, as was done in this case after said Steamer was inspected, enrolled licensed under the laws of the United States, and actually engaged in commerce between different states.

5th: That the Court erred in holding that the Steamer Winnebago, built for use in interstate commerce, was a vessel used or intended to be used in navigation the waters of the State of Michigan, as provided by the statutes of the state of Michigan.

6th: That the Court erred in holding that the statutes of Michigan, providing liens for contracts to furnish materials and supplies for the construction of a vessel intended for use in interstate commerce, did not contravene the Constitution and laws of the United States.

7th: That the Court erred in holding that the Columbia Iron works was not a sub-contractor and had a right to create upon and incumber a vessel, intended to be used in interstate commerce, with liens for materials furnished in her construction and equipment.

8th: That the Court erred in holding that under the Statutes of Michigan it was not necessary to show that the materials and supplies furnished to the said Steamer Winnebago during her construction and equipment, were used in and about her construction, although the said vessel was intended to be used and was subsequently used in interstate commerce.

230 9th: That the Court erred in holding that a different rule for contracting for and furnishing materials to a vessel, applied in cases of liens provided against vessels used in interstate com-

merce under the Statutes of Michigan, than would apply to similar cases under the maritime law of the United States or in admiralty.

10th: That the Court erred in holding that the Sheriff of Wayne County, under process from the Circuit Court of Wayne County, Michigan, had authority and a right to seize the Steamer Winnebago under process of the said Court against her, while navigating the Detroit River and while engaged in carrying a cargo from one foreign state to another foreign state.

11th: The Court erred in holding that the Delaney Forge Company, a corporation organized under the laws of the State of New York, and having its principal place of business in Buffalo, New York, had a right, under the statutes of Michigan, to bring a proceeding *in rem*, and enforce a lien against the Steamer Winnebago, an enrolled and licensed vessel of the United States, while in the hands of an innocent purchaser, without notice of any lien.

12th: That the Court erred in affirming the decision of the Circuit Court of Wayne County, and that the latter Court erred, as stated in the above assignment of errors.

CHARLES E. KREMER,
WM. J. GRAY,
Attorneys for Petitioner, Iroquois Transportation Company.

230½ Supreme Court of the State of Michigan.

DELANEY FORGE & IRON COMPANY, and GEORGE W. EDWARDS ET AL., Complainants and Defendants in Error,

vs.

IROQUOIS TRANSPORTATION COMPANY, Claimant of the Steamer "Winnebago," and UNITED STATES FIDELITY AND GUARANTY COMPANY OF BALTIMORE, MARYLAND, Defendants and Plaintiffs in Error.

STATE OF MICHIGAN, *In Supreme Court, ss:*

I, Charles C. Hopkins, Clerk of the Supreme Court of the State of Michigan, do hereby certify that the annexed and foregoing is a true and correct copy of the record and of all proceedings had and determined in the above entitled cause by said Supreme Court, including the written decision and reasons therefor, signed by the Judges of said Court, and filed in my office, as appears of record and on file in said cause; that I have compared the same with the original and it is a true transcript therefrom and of the whole thereof; that said cause was heard with the case of Delaney Forge and Iron Company, complainant *vs.* Iroquois Transportation Company, Claimant, etc. and United States Fidelity and Guaranty Company of Baltimore Maryland, surety, Defendants, said causes being heard on one record, and one opinion being filed therein; that attached thereto are the writ of Error with allowance endorsed thereon, the citation with proof of service of copy thereof on adverse party, and

a copy of the bond, duly approved together with Assignments of Error in said cause.

In testimony whereof I have hereunto set my hand and affixed the seal of said Supreme Court at the City of Lansing this twenty-seventh day of February, in the year of our Lord nineteen hundred and six.

[Seal of the Supreme Court of Michigan, Lansing.]

CHAS. C. HOPKINS,
Clerk Supreme Court of the State of Michigan.

231 UNITED STATES OF AMERICA, *ss:*

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the Honorable the Judges of the Supreme Court of the State of Mchigan, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Supreme Court before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between Iroquois Transportation Company, Claimant of the Steamer "Winnebago," &c., and United States Fidelity & Guaranty Company of Baltimore, Maryland, surety, appellants, and George W. Edwards, Frank W. Eddy and George W. Edwards, Executor of the estate of H. D. Edwards, deceased, copartners as H. D. Edwards & Company, appellees, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity; or wherein was drawn in question the construction of a clause of the Constitution, or of
232 a treaty, or statute of, or commission held under the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission; a manifest error hath happened to the great damage of the said Iroquois Transportation Company, Claimant of the Steamer "Winnebago," &c., as by its complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within 30 days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the twenty-ninth day of January, in the year of our Lord one thousand nine hundred and six.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

Allowed by
JOHN M. HARLAN,
Associate Justice of the
Supreme Court of the United States.

To the Supreme Court of the United States:

The execution of the within writ appears by the transcript of record hereto annexed.

[Seal of the Supreme Court of Michigan, Lansing.]

CHAS. C. HOPKINS,
Clerk Supreme Court of the State of Michigan.

Dated Feb. 27, 1906.

233 *Bond.*

Know all men by these presents, That we, the Iroquois Transportation Company, as principal, and Bankers Surety Company, as sureties are held and firmly bound unto George W. Edwards, Frank W. Eddy and George W. Edwards, executor of the estate of H. D. Edwards, deceased, in the full and just sum of Five Hundred dollars, to be paid to the said George W. Edwards, Frank W. Eddy and George W. Edwards, executor of the estate of H. D. Edwards, deceased, their certain attorney, executors, administrators, or assigns: to which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 24th day of January, in the year of our Lord one thousand nine hundred and six.

Whereas, lately at a term of the Supreme Court of Michigan, in a suit depending in said Court between George W. Edwards, Frank W. Eddy and George W. Edwards, executor of the estate of H. D. Edwards, deceased, and the Steamer Winnebago, Iroquois Transportation Company, claimant, was rendered against the said Steamer Winnebago and Iroquois Transportation Company, claimant, and the said Iroquois Transportation Company having obtained a Writ of Error and filed a copy thereof in the Clerk's Office of the said Court to reverse the judgment in the aforesaid suit, and a citation directed to the said George W. Edwards, Frank W. Eddy, and George W. Edwards, executor of the estate of H. D. Edwards, deceased, citing and admonishing them to be and appear at a Supreme Court of the United States, at Washington within thirty days from the date thereof.

Now, the condition of the above obligation is such, that if the said Iroquois Transportation Company shall prosecute its said writ of error to effect, and answer all damages and costs if it fail to make its plea good, then the above obligation to be void; else to remain in full force and virtue.

IROQUOIS TRANSPORTATION CO.,
By C. E. KREMER, *Pres't.* [SEAL.]
THE BANKERS SURETY CO.,
JOHN H. HUME, [SEAL.]
Attorney in Fact.
GEORGE K. THOMAS, *Att'y in Fact.*

Attest:
THOMAS J. PRINDDIVILLE, *Sec'y.*

Approved by,
JOHN M. HARLAN,
Justice S. C. U. S.

234 In the District Court of the United States for the Northern District of Illinois.

I, T. C. MacMillan, Clerk of the District Court of the United States for the Northern District of Illinois, do hereby certify that The Bankers Surety Company, the surety on the annexed bond of the Iroquois Transportation Co. is sufficent security for the sum of five hundred dollars, the penalty of said bond.

In testimony whereof I have hereunto set my hand and affixed the seal of said Court at my office in Chicago, this January 26, A. D. 1906.

[SEAL.] T. C. MACMILLAN, *Clerk.*

(Endorsed:) Filed Feb. 6, 1906. Chas. C. Hopkins, Clerk.

235 UNITED STATES OF AMERICA, *ss:*

To George W. Edwards, Frank W. Eddy, and George W. Edwards, Executor of the estate of H. D. Edwards, deceased, copartners as H. D. Edwards & Company, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to a writ of error, filed in the Clerk's Office of the Supreme Court of the State of Michigan wherein Iroquois Transportation Company, Claimant of the Steamer "Winnebago," &c., is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable John M. Harlan, Associate Justice of the Supreme Court of the United States, this twenty-ninth day of January, in the year of our Lord one thousand nine hundred and six.

JOHN M. HARLAN,
Associate Justice of the Supreme Court of the United States.

Service of a copy of the above admitted.
JOHN C. SHAW,
Counsel for Defendant in Error.

236 In the Supreme Court of Michigan.

DELANEY FORGE & IRON COMPANY, Complainant; GEORGE W. EDWARDS ET AL., Intervening Complainants,
vs.
STEAMER WINNEBAGO, IROQUOIS TRANSPORTATION COMPANY, Claimant.

Assignments of Error.

The Iroquois Transportation Company, the claimant of the Steamer Winnebago, in the above entitled cause, in this suit, in connection with its petition for a writ or error, makes the following assignment of errors ,which it avers occurred upon the trial of the case of George W. Edwards, Frank W. Eddy and George W. Edwards Executor of the estate of H. D. Edwards, deceased, to wit:

1st: That the Supreme Court of Michigan erred in holding that a contract to build a ship to be used, or intended to be used in interstate commerce upon the Great Lakes, is not, under the maritime law of the United States, a maritime contract.

2nd: That the Court erred in holding that the contract for supplies and materials furnished in completing the construction and equipment of the said steamer Winnebago, after she was launched and afloat in the St. Clair River, was not a maritime contract.

3rd: That the Court erred in holding that the State Courts of Michigan had jurisdiction and a right to enforce a lien under the laws of the State of Michigan, arising on contracts for supplies and material furnished in the construction of a vessel built and to be used in interstate commerce by a proceeding *in rem* against the Steamer Winnebago, as is provided by the laws of Michigan, and as was done in this suit after the said Steamer had been launched
237 and was afloat in the St. Clair River.

4th: That the Court erred in holding that the Courts of Michigan had jurisdiction and a right to enforce liens under the laws of the State of Michigan, in contracts for furnishing materials and supplies to a Steamer built and intended to be used in interstate commerce, by a proceeding *in rem* against the Steamer, as was done in this case after said Steamer was inspected, enrolled and licensed under the laws of the United States, and actually engaged in commerce between different States.

5th: That the Court erred in holding that the Steamer Winnebago built for use in interstate commerce, was a vessel used, or intended to be used in navigating the waters of the State of Michigan, as provided by the statutes of the State of Michigan.

6th: That the Court erred in holding that the statutes of Michigan, providing liens for contracts to furnish material and supplies for the construction of a vessel intended for use in interstate commerce, did not controvene the Constitution and laws of the United States.

7th: That the Court erred in holding that the Columbia Iron Works was not a sub-contractor and had a right to create upon and incumber a vessel, intended to be used in interstate commerce, with liens for materials furnished in her construction and equipment.

8th: That the Court erred in holding that under the statutes of Michigan it was not necessary to show that the materials and supplies furnished to the said Steamer Winnebago during her construction and equipment, were used in and about her construction, although the said vessel was intended to be used and was subsequently used in interstate commerce.

9th: That the Court erred in holding that a different rule for contracting for and furnishing materials to a vessel, applied in cases of liens provided against vessels used in interstate commerce under the statutes of Michigan, than would apply to similar cases
238 undr the maritime law of the United States or in admiralty.

10th: That the Court erred in holding that the Sheriff of Wayne County, under process from the Circuit Court of Wayne County, Michigan, had authority and a right to seize the Steamer Winnebago under process of the said Court against her, while navigating the Detroit River and while engaged in carying a cargo from one foreign state to another foreign state.

11th: That the Court erred in affirming the decision of the Circuit Court of Wayne County, and that the latter Court erred, as stated in the above assignment of errors.

CHARLES E. KREMER,
WM. J. GRAY,
Attorneys for Petitioner, Iroquois Transportation Company.

239 Supreme Court of the State of Michigan.

DELANEY FORGE AND IRON COMPANY, Complainant and Defendant in Error,

vs.

IROQUOIS TRANSPORTATION COMPANY, Claimant of the Steamer "Winnebago," and UNITED STATES FIDELITY AND GUARANTY COMPANY OF BALTIMORE, MARYLAND, Surety, Defendants and Plaintiffs in Error.

STATE OF MICHIGAN, *In Supreme Court, ss:*

I, Charles C. Hopkins, Clerk of the Supreme Court of the State of Michigan, do hereby certify that the annexed and foregoing is a true and correct copy of the record and of all proceedings had and determined in the above entitled cause by said Supreme Court, including the reasons and written decision therefor, signed by the Judges of said Court, and filed in my office, as appears of record and on file in said cause; that I have compared the same with the original, and it is a true transcript therefrom and of the whole thereof; that the said cause was heard and decided with the case of Delaney Forge and Iron Company *vs.* Steamer Winnebago, Iroquois Transportation Co., and George W. Edwards *et al.*, intervening Complainants, one opinion filed for and in both of said cases, the record in both cases being printed together in form as it now appears; that attached hereto are the Writ of Error, with allowance endorsed thereon, the Citation, with proof of service of copy thereof on adverse party, and a copy of the bond, duly approved, together with the Assignments of Error in said cause.

In testimony whereof I have hereunto set my hand and affixed the seal of said Supreme Court, at the City of Lansing this twenty-seventh day of February, in the year of our Lord nineteen hundred and six.

[Seal of the Supreme Court of Michigan, Lansing.]

CHAS. C. HOPKINS,
Clerk Supreme Court of the State of Michigan.

Endorsed on cover: Filed No. 20,122. Michigan supreme court. Term No. 218. Iroquois Transportation Company, claimant of the steamer "Winnebago," &c., plaintiff in error, *vs.* De Laney Forge & Iron Company. File No. 20,123. Term No. 219. Iroquois Transportation Company, claimant of the steamer "Winnebago," plaintiff in error, &c., *vs.* George W. Edwards, executor of the estate of H. D. Edwards, deceased, copartners as H. D. Edwards & Company. Filed March 12th, 1906. File Nos. 20,122 and 20,123.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1906.

No. 218.

IROQUOIS TRANSPORTATION COMPANY, claimant of the Steamer Winnebago, etc.,
Plaintiff in Error,

vs.

DE LANEY FORGE AND IRON COMPANY,
Defendant in Error.

Error to the Supreme Court of Michigan.

BRIEF FOR PLAINTIFF IN ERROR.

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BRIEF FOR PLAINTIFF IN ERROR.

This is a proceeding by the Delaney Forge & Iron Company, of Buffalo, New York, against the Steamer Winnebago, of Michigan City, Indiana, brought under Sec. 10,789, Compiled Laws of Michigan, 1897.

The Winnebago is a steel steamer of 1091 tons burthen and was built by the Columbia Iron Works at St. Clair, Michigan, for the Iroquois Transportation Company, a corporation organized under the laws of the State of Indiana. The contract for the construction of this steamer was made on March 8, 1902, between the Columbia Iron Works and John J. Boland and Thomas J. Prindiville, and by the lat-

ter assigned to the Iroquois Transportation Company April 5, 1902.

The construction of the vessel was begun in 1902, and the cash payments under the contract were as follows:

$7,500 at the date of signing the contract.
$7,500 April 3, 1902.
$4,000 April 15, 1902.
$4,000 June 15, 1902.
$4,000 Aug. 15, 1902.

And in addition to this, changing the terms of the contract, there was an additional $4,000 paid in October, 1902, and two negotiable notes of $4,000 each given, maturing respectively Nov. 1, 1903, and Nov. 1, 1904.

The steamer was launched March 21, 1903, but was not completed for delivery until July 19, 1903, at which time the Iroquois Transportation Company received a bill of sale of the steamer and delivered to the Columbia Iron Works 96 negotiable bonds of $500 each, secured by a mortgage on the steamer, and paid the balance of the cash payment, which was to be made on the completion of the vessel, and which then amounted to between $400 and $500, and in that way paid in full the purchase price of the steamer.

The contract is found on record page 143.

On the 18th of July, 1903, the steamer was inspected, measured and enrolled under the laws of the United States, and also licensed to be employed in domestic and foreign trade for one year from the date of enrollment. (Record, pages 140, 142.)

She left on the 19th of July for Lorain, Ohio, where she took on board a cargo of railroad iron.

At the time of her departure from St. Clair she had not been entirely completed and some of the workmen remained on board of her and returned with her to St. Clair; where she remanied for a day or two and where additional work was done upon her, and after that she was engaged in carrying cargoes between different points on Lake Erie and points on Lake Superior, having brought one cargo from Marquette, Michigan, and another from Lake Linden to ports on Lake Erie.

On the 30th day of July, or within eleven days after the steamer was delivered, the Columbia Iron Works made a common law assignment for the benefit of its creditors.

On the 25th day of August, the Delaney Forge & Iron Company served a notice on the Iroquois Transportation Company that it made a claim of lien against the steamer for forgings and material furnished, and in October following the present complaint was filed in the Circuit Court of Wayne County and process issued, the steamer attached and a bond given for her release by the Iroquois Transportation Company. About the same time, after notice, George W. Edwards and others filed an intervening complaint in the same court and in this also the Iroquois Transportation Company appeared, filed a bond for the release of the steamer and subsequently filed its answer in both cases.

A hearing was had before Judge Donovan without a jury, in the Circuit Court of Wayne County in May, 1904, and at this hearing the court found the issues for the plaintiff in both cases, entering judgment in the case of the Delaney Forge & Iron Company for $1,999.90, with interest from Aug. 1, 1903,

In the case of George W. Edwards, *et al.*, for the sum of $1,599.64, with interest from June 30, 1903.

From these judgments the Iroquois Transportation Company took an appeal to the Supreme Court of Michigan and there these decrees were affirmed, whereupon error was assigned and the cases removed to this court.

BRIEF.

I.

That the Steamer Winnebago was, at the time of her seizure, not used or intended to be used in navigating the waters and canals of this state.

Sauter v. *The Sea Witch,* 1st Cal., 162.
Tucker v. *Sacramento,* 1st Cal., 403.
Ray v. *Henry Harbeck,* 1st Cal., 451.
Haytien Republic, 65 Fed. Rep., 120.

II.

That the complainant cannot recover in this case because the appellant, at the time that it received notice of this claim, and at the time of the seizure of the steamer Winnebago in this suit, was a *bona fide* purchaser without notice of complainant's lien, and that complainant did not file in the proper court in the county in which it resided its claim for a lien within one year.

Sec. 8299, 45, Compiled Laws of Michigan.

III.

A proceeding under the statutes of Michigan against a vessel which has already been enrolled and licensed under the laws of the United States, and at the time of the seizure was actually engaged in interstate commerce, is unconstitutional and void because in conflict with the constitution and laws of the United States.

The Glide, 167 U. S., 606.
Johnson v. *Elevator Company*, 119 U. S., 397.
White's Bank v. *Smith*, 7 Wall., 646.
The Menominee, 36 Fed. Rep., 197.
Perry v. *Haynes*, 191 U. S., 17.
The Edith, Fed. Case 4283, 11 Blatch., 451.
The Edith, 94 U. S., 519.
Moir v. *The Dubuque*, Fed. Case 9696.
The Roanoke, 189 U. S., 185.

IV.

The material and supplies were not furnished on the credit of the vessel, but were contracted for, furnished and delivered to and on the credit of the Columbia Iron Works.

The Templar, 59 Fed. Rep., 203.
The Ferry Co. v. *Beers*, 20 How., 393.
The Underwriter, 109 Fed. Rep., 754.
Stephenson v. *Francis*, 31 Fed. Rep., 720.
The Westover, 76 Fed. Rep., 384.
The Abby Whitman, Fed. Case 15.
Drew v. *Hull of a New Ship*, Fed. Case 4078.
Van Pelt v. *Ohio*, Fed. Case 16870.

The Calisto, Fed. Case 2316.

Sewell v. *Hull of a New Ship,* Fed. Case 12682.

Van Cleve Glass Co. v. *Erratt,* 110 Mich. 689.

V.

The complainants have no lien enforcible under this act for any contracts made or material furnished after the vessel was launched on March 21, 1903.

Globe Iron Wks. v. *Steamer,* 100 Mich., 583.

Lake v. *Manhattan,* 46 Fed. Rep., 797.

Perry v. *Haynes,* 191 U. S., 7.

Tucker v. *Alexandroff,* 183 U. S., 424.

VI.

That the steamer Winnebago, engaged in interstate commerce, was not subject to seizure while passing from port to port through the waters within the jurisdiction of the courts of the State of Michigan.

Mich. C. R. Co. v. *Chicago M. L. S. Co.,* 1 Ill. App., 339.

Wall v. *Norfolk W. R. Co.,* 52 W. V., 485; 64 L. R. A., 501.

Connery v. *Quincy O. & K. C. R. Co.,* 99 N. W., 365; 64 L. R. A., 624.

VII.

The contract to build a ship is a maritime contract and therefore there is a lien for material and labor furnished which can be enforced in a court of admiralty, there being a lien under the state law.

People's Ferry Co. v. *Beers,* 20 How., 383.

Roach v. *Chapman,* 22 How., 129.

J. E. Rumbell, 148 U. S., 1.

Davis v. *New Brig,* Fed. Cas., 3643.

Read v. *Hull of a New Brig,* Fed. Cas., 11,609.

The Calisto, Fed. Cas., 2316.

The Hull of a New Ship, Fed. Cas., 6859.

Van Pelt v. *The Ohio,* Fed. Cas., 16,870.

The Abbie Whitman, Fed. Cas., 15.

Sewall v. *The Hull of a New Ship,* Fed. Cas., 12,682.

Purington v. *The Hull of a New Ship,* Fed. Cas., 11,478.

The Richard Busteed, Fed. Cas., 11,764.

Drew v. *The Hull of a New Ship,* Fed. Cas., 4078.

The Chas. Mears, Fed. Cas., 10,766.

N. J. Steam Nav. Co. v. *Merchants' Bank,* 6 How., 378.

Benedict's Admiralty (2 Ed.), Sec. 264.

De Lovio v. *Boit,* 2 Gall., 475.

Insurance Co. v. *Dunham,* 78 U. S. (11 Wall.), 10.

Parsons on Shipping and Admiralty, Vol. 2, p. 327.

Dupont De Nemours v. *Vance,* 19 How., 162.

The Grape Shot, 9 Wall., 129.

The Guy, 9 Wall., 758.

The Lulu, 10 Wall., 192.

The General Custer, 10 Wall., 204.

The Patapsco, 13 Wall., 329.

The Robert Parsons, 191 U. S., 17.

The Blackheath, 195 U. S., 361.

The Magnolia, 20 How., 296-307.

Tucker v. *Alexandroff*, 183 U. S., 424.
Globe Iron Wks. v. *Steamer*, 100 Mich., 583.
The Eliza Ladd, Fed Cas., 4364.

BRIEF AND ARGUMENT.

This is a proceeding instituted in the Circuit Court of Wayne County, Michigan, by the Delaney Forge and Iron Company against the Steamer Winnebago *in rem*, under the Water Craft Act of Michigan.

The act under which this proceeding is brought is found in 3 Compiled Laws of Michigan, page 3254, and is as follows:

> "(10789) Sec. 2. Every water craft of above five tons burthen, used or intended to be used, in navigating the waters of this state, shall be subject to a lien thereon:
>
> "First, for all debts contracted by the owner or part owner, master, clerk, agent or steward of such craft, on account of supplies and provisions furnished for the use of said water craft, on account of work done or services rendered, on board of such craft, by seamen, or any employe, other than the master thereof; on account of work done or services rendered, by any person, in or about the loading or unloading of said water craft; on account of work done or materials furnished, by mechanics, tradesmen, or others, in or about the building, repairing, fitting, furnishing or equipping such craft: Provided, that when labor shall be performed or materials furnished as aforesaid, by a sub-contractor, or workman, other than an original contractor, and the same is not paid for, said person or persons may give the owner or his agent, or the master or clerk of said craft, timely no-

tice of his or their said claim, and from thenceforth said person or persons, shall have a lien upon said craft, *pro rata*, for his or their said claims, to the amount that may be due by said owner, to said original contractor, for work or labor then done on said water craft."

I.

THAT THE STEAMER WINNEBAGO WAS, AT THE TIME OF HER CONSTRUCTION AND SEIZURE NOT USED OR INTENDED TO BE USED IN NAVIGATING THE WATERS OR CANALS OF THIS STATE.

That the steamer was not built for or intended to be used in navigating the waters of the State of Michigan exclusively, is practically conceded. She was built for the general lake trade and during the time she was actively sailing had carried cargoes between ports in the states of Ohio and New York and ports on Lake Superior in the states of Michigan, Minnesota and Province of Ontario. The fact that while navigating between these ports she at times passed through waters which were within the boundaries of the State of Michigan, did not alter the fact that she was not intended for or used in navigating exclusively within the waters of the State of Michigan.

A vessel intended for the New York and China trade did not come within the acts of the legislature of the state of California, which provided a lien upon vessels navigating the *waters of this state.*

Sauter v. *Sea Witch,* 1 Cal., 162.
Tucker v. *Sacramento,* 1 Cal., 403.
Ray v. *Henry Harbeck,* 1 Cal., 451.

The laws of Oregon restrict liens upon boats to those navigating the waters of the state or construct-

ed in the state. It was held that this law did not apply to vessels engaged in navigation between the ports of Oregon and foreign ports.

The Haytien Republic, 64 Fed. Rep., 120.

The appellees will doubtless cite the case of *Canfield* v. *The Brig,* 27 Mich., 479, in which it is held that the act is not confined to water craft used or intended to be used exclusively in navigating the waters of the state, and that the brig in question was in this particular case strictly within the terms of the act.

The court in that case so held because at the time of the collision between the brig and the booms and logs which she damaged, she was as a matter of fact navigating the waters of the State of Michigan. The Winnebago, however, when some of the liens arose was on the land and not navigating at all. She was within the state, but not navigating its waters. The case in the 27th Mich. is therefore not in point and should not be a controlling authority in the light of the decision in Oregon and California, and the later decisions of the Supreme Court in which it has been held that the water craft acts of the different states must be most strictly construed and, that their provisions cannot be extended by implication to cases which are not within the plain import of the language of the acts.

II.

THAT THE COMPLAINANT CANNOT RECOVER IN THIS CASE BECAUSE THE APPELLANT, AT THE TIME IT RECEIVED NOTICE OF THE COMPLAINANT'S CLAIM, AND AT THE TIME OF THE SEIZURE OF THE STEAMER WINNEBAGO IN THIS SUIT, WAS A BONA FIDE PURCHASER WITHOUT NOTICE OF COMPLAINANT'S LIEN, AND THAT COMPLAINANT DID NOT WITHIN A YEAR FILE IN THE PROPER COURT IN THE COUNTY IN WHICH IT RESIDED, ITS CLAIM FOR A LIEN.

It is conceded that the complainant is a corporation organized under the laws of New York, and that its residence is Buffalo, New York. There is no proof that it has any residence, temporarily, or otherwise, in the State of Michigan. The complaint in this case was filed in the Michigan Wayne County Circuit Court. It was therefore not filed in the proper court in the *county in which the complainant resided.* The section of the statute under which we make this defense is as follows:

> 8279.—45—"Liens may be enforced under this act at any time within six years from their origin: *Provided,* that no lien shall be enforced against a water-craft in the hands of a *bona fide* purchaser without notice unless a complaint to enforce the same shall have been filed in the proper court, in the county where the party claiming the lien resides, within one year from the time the same accrued."

The court under the evidence must find that the Iroquois Transportation Company was not the owner and in possession of the Winnebago during the time the liens sought to be enforced here accrued, and that it did not become such owner until the 18th day of July, 1903, when it received its bill of sale, then it is established beyond all doubt

the steamer was when this suit was brought in the hands of the Iroquois Transportation Company, an innocent purchaser for value. It was for the complainant to show affirmatively *that the appellant was not a bona fide purchaser without notice,* or if it was, that a complaint to enforce this lien had been filed within one year, *in the county where the complainent resided.* (Rec., 70, 71, 72.)

This was not done.

The appellant when its answer came in alleged that it was a *bona fide* purchaser without notice.

This answer was filed in November, 1903, and the liens had accrued between December, 1902, and July, 1903.

The complainant knew then, if it did not before, that the appellant was a *bona fide* purchaser without notice, and if complainant chose to, it still had time to bring itself within the provisions of Section 45 if it could do so at all.

The complainant, however, not residing in any county in this state, *could not bring itself* within the terms of this statute. To file a complaint in the courts in Erie County, New York, to enforce its lien under a statute of Michigan, could not be done, as the watercraft lien laws of the different states are not enforceable in any other state except in admiralty in a proper case.

Section 3 provides that the complainant may file a complaint with the clerk of the Circuit Court of any county.

It is only in cases in which the rights of a *bona fide* purchaser without notice come in, *that the complaint must be filed in the county where the person claining the lien resides.*

Within one year after the lien accrues if a vessel subject to a lien under this act goes into the hands of such a purchaser the complaint must be filed in the particular county in which the person claiming the lien resides, and it cannot be filed elsewhere.

Therefore, when it appears that the vessel when seized was in the hands of such a purchaser, and it also appears that the complaint was not filed in the proper county, the court loses jurisdiction and the complaint must be dismissed. It is therefore only necessary to plead the fact that there was a *bona fide* purchaser without notice to give the claimant the benefit of this statute, and the complainant the notice, so that he can reply by amended complaint, or cure the deficiency by filing his complaint in the proper county.

The legislature, in adding this provision to the act, doubtless intended that the law was made solely for the protection of the citizens of Michigan, and it is not difficult for such citizens to protect themselves by filing their claims in the court of the county in which they reside, and all such citizens could therefore preserve their lien, no matter how long after filing the complaint they might be, in obtaining process and a seizure under it. The filing of the complaint in the proper court preserved the lien for an indefinite period against a *bona fide* purchaser, and one year was allowed for this purpose.

As the complainant in this case does not reside in Michigan its lien was only valid *so long as the rights of an innocent bona fide purchaser did not intervene.* It could protect itself by making a seizure before such a contingency arose, or by giving such notice as would make it impossible for a person to

purchase the vessel without notice of its lien. In this case it is conceded that no notice whatever was given of the existence of the lien until more than a month after the Iroquois Transportation Company had paid the full price for the steamer and taken her away from St. Clair. Had the complainant given the notice before the 18th day of July, which it might have done, as the master of the Winnebago had been around her and subsequently on board of her from December until the day she left, and her engineer had been employed on her from March until July, the case would have been different. So well satisfied, however, was the complainant with the standing and credit of the Columbia Iron Works that it took no steps whatever to protect itself by giving notice of any claim of lien that it might have on the steamer.

This watercraft act, being in derogation of the common law (which provides for no such lien), must be strictly construed and the complainant, before it can recover, must bring itself clearly within the terms of the act. This it has not done and could not do, as the act was not intended to protect the lien of any foreign creditor the moment the rights of an innocent purchaser intervened. Under a proper construction of the act the complainant cannot recover, and this, under the peculiar circumstances of this case, is no hardship, because, even though it had not been paid for the material it furnished, the appellant had clearly paid the Columbia Iron Works for all it received, and if this lien is held to be valid would have to pay twice for so much as was put into this ship by the complainant.

The equities are with the appellant. The com-

plainant could have protected itself by giving the information of the existence of the lien, as the appellant did not know, and could not have known that the complainant would claim a lien upon the vessel. There is nothing to indicate that such a claim would be made, but, on the contrary, there was every indication that all of the material had either been paid for, or the payment of the same so secured that no lien would or could be claimed upon this steamer.

Had the appellant inquired, it would have learned from the statement of the complainant sent to the Columbia Iron Works on July 1st, that the indebtedness to it was very small, amounting to less than the material which it had furnished to the Steamer Howard, which was then still in the ship yard in an unfinished state. The complainant had given credit on its books for the $5,000 note which it received, just as the Columbia Iron Works had charged the account of the complainant with the amount of this note, and there cannot be the slightest doubt in the minds of any one regarding the testimony explaining these accounts, that it was given, accepted, intended and considered as payment of the account at least up to the time that the note was presented for payment.

The equities therefore are stronger with the appellant, and the court ought not to be quick to ask it to pay a second time for what it has once paid for.

III.

A PROCEEDING UNDER THE STATUTES OF MICHIGAN AGAINST A VESSEL WHICH HAS ALREADY BEEN ENROLLED AND LICENSED UNDER THE LAWS OF THE UNITED STATES, AND AT THE TIME OF THE SEIZURE WAS ACTUALLY ENGAGED IN INTERSTATE COMMERCE, IS UNCONSTITUTIONAL AND VOID BECAUSE IN CONFLICT WITH THE CONSTITUTION AND LAWS OF THE UNITED STATES.

In this case the Winnebago was launhced March 21, 1903. She then became a vessel subject to admiralty jurisdiction. (*Tucker* v. *Alexandroff*, 183 U. S., 424, in which this court held that a vessel becomes such as soon as she is launched.) On July 18th, she was enrolled and licensed under the laws of the United States, and from the 19th day of July, 1903, was actually engaged in interestate commerce between the ports of different places on the Great Lakes.

While so navigating all those serving on board of her in any useful capacity; all those furnishing supplies, such as fuel and provisions; and all those who rendered towage and salvage services to her, or furnished material and supplies for her repair or equipment, had liens under the maritime law, in all cases except when supplies were furnished at Michigan City, Indiana, and even these liens, and any other liens that might accrue at the home port (if, under the laws of Indiana there was a lien), could be enforced in the courts of admiralty of the United States.

To seize the vessel and subject her to sale, and the proceeds of the sale to distribution in the state court, would be in direct conflict with proceedings in admiralty under the laws of the United States, and

would trench upon the exclusive jurisdiction of the federal courts.

In the case of the *Glide,* 167 U. S., 606; 17 S. C., 930, Mr. Justice Gray, in deciding the case, says, referring to proceedings under Water Craft Acts of the states, page 943:

> "Such actions may also be maintained *in personam* against a defendant in the common law courts, as the common law gives; all in consistence with the grants of admiralty powers in the ninth section of the judiciary act. But it could not have been the intention of congress, by the exception in that section, to give the suitor all such remedies as might afterwards be enacted by state statutes, for this would have enabled the states to make the jurisdiction of their courts concurrent in all cases by simply providing a statutory remedy for all cases. Thus the exclusive jurisdiction of the federal courts would be defeated."

On the same page, in speaking of a *dicta* of Mr. Justice Clifford, pronounced in 7 Wall., 624, and repeated in *Leon* v. *Galceran,* 11 Wall., 185, 192, and in *Norton* v. *Switzer,* 93 U. S., 355, 365, stated as follows:

> "Such a lien does not arise in a contract for materials and supplies furnished to a vessel in her home port and in respect to such contracts it is competent for the states, under the decisions of this court, to create such liens as their legislatures may deem just and expedient, not amounting to a regulation of commerce, and to enact reasonable rules and regulations prescribing the mode of their enforcement."

Mr. Justice Gray says:

> "If understood, as contended by defendants in error, to imply that the states may authorize

> such liens to be enforced in their own courts by proceedings in the nature of admiralty process *in rem*, it is unsupported by the decisions there referred to, or by any other decisions of this court, and is inconsistent with several recent opinions of this court in which the subject was fully considered."

The learned justice, referring to the decision by Justice Blatchford in the case of *Johnson* v. *Elevator Company*, 119 U. S., 397, refers to their language on page 935 as follows:

> "Liens, under state statutes, enforcible by attachments in suits *in personam*, are of every day occurrence, and may even extend to liens on vessels when the proceedings to enforce them do not amount to admiralty proceedings *in rem*, or otherwise conflict with the constitution of the United States."

In this latter case the proceeding was *in personam* under the Illinois statute, and the attachment was ancillary and, the court held, was an incident of a common law remedy and in a case in which the admiralty courts had no jurisdiction.

In the case at bar the proceeding is under a watercraft act which follows, as near as may be, the proceeding *in rem* and in admiralty.

In examining the further provisions of the statute we find that Section 8261 provides for a hearing "*as in admiralty* in cases of general average, salvage, collision and seamen's wages."

Section 8263 provides for judgment against the craft, ordering it to be sold at public vendue by the sheriff on ten days' notice.

Section 8265 provides that the sheriff, after the sale, shall deliver to the purchaser a bill of sale,

and that the proceeds of the vessel be paid to the clerk of the court.

Section 8266 provides that the enrollment under the laws of the United States shall be recited in the bill of sale, and that this will show the regularity of the sale, and that

> "it shall be as effectual to pass the title of such water craft free and clear of all liens existing, before such sale under this act, or any previous law of this state, and all liens asserted, or which might have been asserted prior to sale to the purchaser, as fully as if made by the owner immediately before the sale, and shall also vest in such purchaser an indefeasible title as against all chattel mortgages, or other incumbrances created by the owner, as well as against the owner himself and such liens as aforesaid."

Section 8267 provides for the distribution of the proceeds as follows:

1st: Costs in all cases filed prior to sale and on which judgment has been entered, or may be within twenty days thereafter, rendered for complainant.

2nd: Salvage.

3rd: Seamen's wages.

4th: All claims filed prior to sale on which judgment may have been, or may, within twenty days thereafter, be rendered in favor of complainant.

Section 8268 provides that any surplus proceeds are to be distributed as follows:

1st: Costs in all decrees on claims filed after sale.

2nd: All other liens enforcible under this act.

3rd: All claims or mortgages or other incumbrances.

4th: The owner.

The provisions of this statute are in conflict with the constitution and laws of the United States, particularly in the sale of the vessel under the decree of the court without regard to the rights of such persons, as may have maritime liens upon her. The title purports to be a perfect title regardless of the maritime liens.

It also distributes the proceeds without regard to the paramount rights of maritime lien bolders, and this distribution is strictly in conflict in many particulars with the distribution of the proceeds of a vessel in a court of admiralty.

In courts of admiralty there is no distinction made between decrees prior to the sale and decrees after the sale. Liens are paid according to their priorities, regardless of the time when the libel to enforce the same is filed.

This statute, when only enforced against vessels which have not yet been launched, or in some cases enrolled and licensed, would not necessarily conflict with proceedings in admiralty, because no maritime lien could arise upon such a vessel, and the craft might not be within the jurisdiction of an admiralty court.

The distinction lies in the fact that at the time of the seizure this vessel had been enrolled and licensed and engaged in navigation, and therefore had become a thing of commerce within the jurisdiction of the federal courts.

See

White's Bank v. *Smith,* 7 Wall., 646.

The case of the *Menominee,* 36 Fed. Rep., 197, holds that the lien law of Minnesota, so far as it

provides a proceeding *in rem,* is unconstitutional.

In the most recent utterances of the Supreme Court on this question in *Perry* v. *Haynes,* 191 U. S., 17; 24 Sup. Ct. Rep., 8, the court held that an act of the State of New York which provides a proceeding *in rem* to enforce a lien for repairs furnished a canal boat engaged in navigation on the Erie Canal, is unconstitutional. They say:

> "A statute providing that a vessel may be sued and made defendant without a proceeding against the owners, or even mentioning their names, partakes of all the essential features of an admiralty proceeding *in rem,* of which exclusive jurisdiction is given to the District Courts of the United States."

The court then goes on to compare the New York statute with the admiralty proceeding and finds that the statute, which in many respects is similar to the Michigan statute, is unconstitutional, because it is a proceeding *in rem* against the vessel by name without a direct proceeding against the owner.

Whatever may be said upon the subject of the right of a state to legislate and provide for a lien upon a vessel for the cost of its construction, and to further provide such methods of enforcement as the legislature may deem necessary, it does not dispose of the question that when once the craft which has been constructed, and upon which the parties furnishing the lumber and material have a lien while she was being constructed, becomes a vessel, a thing of commerce between states, it becomes subject to the laws of the United States, and these liens cannot be enforced against it in a direct proceeding *in rem,* because such a proceeding, when

sought to be enforced against a vessel which is subject to the jurisdiction of the admiralty court, creates the same conflict that would be created had the cause of the lien arisen after the vessel was enrolled and licensed. It is the interference with the jurisdiction of the admiralty court over a vessel when she becomes such, and subject to admiralty jurisdiction, that is obnoxious.

If the lien can be enforced in any other manner than by a direct proceeding *in rem,* as by a suit *in personam,* with a right of attachment as an incident to that suit, then the proceeding is one which can be permitted, as was the case in *Johnson* v. *The Elevator Company, supra.* But in no case has it been said that a proceeding *in rem,* as followed in admiralty, can be brought against an enrolled and licensed vessel in any state court.

In the case of the *Edith,* Fed. Cas 4283, 11 Blatch., 451, the court, on page 315, say:

> "But it may well be doubted that the Supreme Court or Mr. Justice Clifford meant to be understood to hold that a state may annex to a maritime contract, *or even to any contract relating to a ship,* a lien which shall operate to withdraw her in any degree from the operation and effect of the law maritime, by which courts of admiralty are governed, and which, by the constitution, they are authorized and are bound to administer, or which shall hinder or prevent courts of admiralty from dealing with the ship in all respects according to the principles of the admiralty law. Can the states, by their statutes, create liens which shall interfere with or disturb the priorities given by the law maritime? If they can, then power to maintain and administer the jurisdiction and laws of the ad-

miralty has not been conferred upon the government of the United States and its courts. For illustration, suppose a case of collision, and a suit against the ship to recover therefor, in the admiralty. Can the state create liens, upon which any party may intervene by cross libel, or otherwise, and assert a priority over the maritime lien, and take, as the case may be, the whole value of the vessel?"

In this case the Supreme Court (*Edith*, 94 U. S., 519), in passing upon the New York statute, said:

> "It matters not that the statutory provisions for enforcing the lien have been adjudged invalid, because beyond the power of the state legislature. If they are invalid it may be doubted whether all the provisions purporting to give a lien are not also invalid because inseparable from the prescribed means of enforcing it. But, without deciding that, we may remark that clearly the state had power to enact that the lien it created should terminate if a bond was given in place of the vessel; and the creditor claiming the lien must take it, subject to the conditions imposed."

In the case of the *Menominee*, 36 Fed. Rep., 197, Judge Shiras holds that the statute of Minnesota which creates a lien is valid, although the proceeding to enforce the lien in a state court is invalid.

If, in this case, the procedure for enforcing the lien is invalid and unconstitutional, then the libelant must resort to some other remedy, and it may well be said that the whole statute must fail and fall because the lien created is inseparably connected with the manner of enforcing it.

In the case of *Moir* v. *The Dubuque*, Fed. Case 9696, Judge Longyear, of the District Court for

the Eastern District of Michigan, held that this statute of Michigan is a proceeding *in rem* and, therefor, contrary to the Act of 1789.

It is contended that the case of *Knapp-Stout & Co.* v. *McCaffrey,* 177 U. S., 638, is an authority in favor of the proposition that where the contract, which is the subject of the lien, is not maritime, the states are privileged to create liens and enforce them by proceedings *in rem.*

This authority does not go so far as to hold that such proceedings *in rem* may follow strictly the practice and procedure in courts of admiralty, nor does it hold that a vessel which is engaged in interstate commerce under the laws of the United States can be reached by a process *in rem* such as is used in the admiralty courts, even though the contract is not maritime. Such a proceeding would trench upon the maritime laws of the United States, and be an interference with the proceedings of the federal courts in admiralty in that it would provide for a different classification and enforcement of liens. It would have to provide for an enforcement and sale which would be in conflict with such liens, and would therefore be as repugnant to the laws of the United States as if the contract had been maritime.

In the case of the *Roanoke,* 189 U. S., 185, the court, in pasing upon a statute of the State of Washington, says:

> "Not only is the statute in question obnoxious to the general maritime law in declaring every contractor and sub-contractor the agent of the owner, but it establishes a new order of priority in the payment of liens, abol-

ishes the ancient and equitable rule regarding stale claims and permits the assertion of a lien at any time within three years, regardless of the fact that the vessel may have been sold to a *bona fide* purchaser. * * * It also gives, or at least creates the presumption of a lien, though the material be furnished upon the order of the owner in person. * * * While no case involving this precise question seems to have arisen in this court, we have several times had occasion to hold that where congress has dealt with a subject within its exclusive power; or where such exclusive power is given to the federal courts, as in cases of admiralty and maritime jurisdiction, it is not competent for the states to invade that domain of legislation and enact laws which in any way trench upon the power of the federal government. Cases arising in other branches of the law furnish apt analogies.

"The principle is stated in a nutshell by Chief Justice Marshall in *Sturges* v. *Crowinshield*, 4 Wheat., 122, 193; 4 L. Ed., 529, 548: 'But it has never been supposed that this concurrent power of legislation extended to every possible case in which its exercise by the states has not been expressly prohibited. The confusion resulting from such a practice would be endless. * * * That whenever the term in which a power is granted to congress, or the nature of the power required that it should be exercised exclusively by congress, the subject is as completely taken from the state legislature as if they had been expressly forbidden to act on it.' This was said of a bankrupt law of New York which assumed to discharge the debtor from all liability for debts previously contracted, notwithstanding the constitution had vested the power in congress of establishing uniform laws on the subject of bankruptcy."

The court then proceeds to refer to a number of

cases in which the laws of different states are held to be unconstitutional because they sought to legislate upon subjects which would interfere with the rights of citizens derived under the constitution and laws of the United States.

In this case the Winnebago, at the time the complaint was filed, had been in commission for several months; actually engaged in carrying cargoes between ports in the State of Ohio and Ontario, Canada, between places in Minnesota and ports in New York, and during that time was in a position to, and doubtless had created many claims which, under the maritime law, were liens upon her.

She hailed from a port and belonged to a corporation resident of the State of Indiana. Had she been sold under process in this case the state court would have given to her purchaser a clear and unincumbered title, and would then have distributed the proceeds of sale according to the provisions of the statute and not according to the priorities established in the courts of admiralty.

This would be very much akin to the case of *Sturges* v. *Crowninshield, supra,* in which the statute of the State of New York discharged the debtor from all liability for debts previously contracted, notwithstanding the constitution had vested the power in congress of establishing uniform laws on the subject of bankruptcy.

In this case under this statute, the sale by the sheriff discharges the vessel of all previous liens, which is conceded to be solely the province of a court of admiralty; as much so as if there had been an act of congress establishing that right.

The act, so far as it provides for the enforcement

of the lien, is clearly inconsistent with the maritime law of the United States and the proceedings in admiralty under it. In the case of *Perry* v. *Haynes, supra,* the court held that the law creating the lien was valid, but so much of it as provided for its enforcement by a proceeding *in rem* was invalid.

In this case so long as the vessel did not become the subject of admiralty jurisdiction the state undoubtedly had a right to create a lien upon her and enforce it, but the moment she became subject to the admiralty jurisdiction such a lien could not be enforced by a proceeding *in rem* as in this case.

IV.

THE MATERIAL AND SUPPLIES WERE NOT FURNISHED ON THE CREDIT OF THE VESSEL, BUT WERE CONTRACTED FOR, FURNISHED AND DELIVERED TO AND ON THE CREDIT OF THE COLUMBIA IRON WORKS.

In this case the contract for the material that was used was made with the Columbia Iron Works and not with the owners of the Winnebago. The material was charged on the books of the complainant to the Columbia Iron Works. The goods were billed and sent to the Columbia Iron Works. There was no notice given to the Iroquois Transportation Company, or to anyone connected with the vessel, that the latter would be looked to as security, or that a lien would be claimed upon her, and from time to time. Beginning with December, monthly statements of account were sent on the first day of each month to the Columbia Iron Works. On June 23rd a promissory note of $5,000 due in 60 days, signed by the Columbia Iron Works, was sent to and accepted by the complainant and credit for this amount

was given on account of the Columbia Iron Works, and the succeeding statement of account, sent on July 1st, showed the account to be less by $5,000 than it was on the month previous. The first notice that was given by the complainant to anyone that it would claim a lien was 26 days after the Columbia Iron Works had made an assignment to its creditors. Then for the first time the complainant gave notice that it claimed a lien under the state law. It is a well settled rule in admiralty that if credit be given to an individual a lien upon the vessel is waived.

In the case of the *Templar,* 59 Fed. Rep., 203, Judge Morrow held that liens under the state statute were subject to the same limitations and enforced by the same rules of procedure, and are subject to the same propositions that would arise in cases of lien under the maritime law.

Ferry Co. v. *Beers,* 20 How., 393.

In this case it was held that the liens on vessels encumber commerce, and are, therefore, discouraged.

The Underwriter, 109 Fed. Rep., 754.

In *Stephenson* v. *Francis,* 21 Fed. Rep., 720, the courts say that secret liens are not favored by the courts.

In the same case it was held that when an owner of a vessel orders repairs, the presumption is that they were furnished upon his credit and not upon the credit of the ship.

A charge upon the books against the vessel is

not conclusive evidence of the intention to create a lien.

In the case of the *Westover*, 76 Fed. Rep., 384, Judge Seaman, quoting from the case of the *Columbia*, 67 Fed. Rep., 555, says:

> "The material inquiry is not whether the libelant himself may have contemplated a claim of lien, but whether a lien was created by or resulted from the mutual understanding of the parties and the services rendered in pursuance thereof."

Much valuable information on the construction of the water craft statutes can be gained from the early decisions in the admiralty courts of this country at a time when they assumed jurisdiction in cases relating to the building of a ship.

The Abbie Whitman, Fed. Case 15 (1854). Sprague, J., Massachusetts. Building a ship. Held credit was given the owner, as all the charges were to the builder, without reference to any vessel. Materials were taken to the yard and no effort made to ascertain for what they were to be used, or in what vessel. Payments were not credited on the separate accounts.

Drew v. *Hull of a New Ship*, Fed. Case 4078. Lumber furnished for building a ship. Massachusets, Sprague, J. (1860). Citing *Rogers* v. *Currier*, 13 Gray, 129. Held that the lumber was not furnished for any specific ship.

Van Pelt v. *The Ohio*, Fed. Case 16,870, New York (1850). Timber furnished to builders of ship. Judson, J., holds that under the laws of New York it should appear that at the time the materials were

furnished it was not upon the personal credit, but upon the credit of a particular ship. It must also appear from all the surrounding circumstances.

The Calisto, Fed. Case 2316 (1840), Ware, J. Services for work on a vessel while being built. Lien being on a domestic vessel must be determined by laws of Maine "Furnished for and on account, etc.," by virtue of a * * * parol agreement. Says: "The statute does not create a lien for labor and materials upon the simple and naked fact that they have been actually employed in the building of the vessel; the lien arises only when the materials and labor are furnished by virtue of a previous agreement." Affirmed by Story, J., in *Read* v. *Hull of a New Ship,* Fed. Case 11,609.

Sewall v. *Hull of a New Ship,* Fed. Case 12,682, 1 Ware, 565 (1855). Ware, J., Maine. Libel for material used in building a ship. Notes given. Defense made by mortgagee. When contract for lumber was made it was known that H. & Co. were engaged in building this ship; that the lumber was such as was ordinarily used in building vessels, and that he had good reasons for believing that it was intended to be used in this vessel. Nothing said on the subject on either side. Does not appear how libelant charged items. Books not produced. The presumption was, therefore, that they would show that they were charged in the usual way. It was conceded that the materials were actually used in building the vessel. "There must be a reference or appropriation, express or implied, to the thing against which the lien is claimed. There is no proof that at any time before H. & Co. suspended libelant ever looked to the ship for security. On the contrary, on set-

tlement a negotiable note was given for the amount due. Nothing was then said by either party about a lien on the vessel. It cannot therefore be said to have been furnished 'for or on account of this ship.'" The court concludes:

> "In order to maintain a lien there must be an appropriation of the material, express or implied, that at the time of the contract, or if not then, at least at the time of the delivery of them and the executior of the contract to the particular vessel against which the lien is claimed."

Some light on this subject may be derived from an examination of the decisions under the mechanic's lien laws of the different states.

In order to constitute a lien under the statute, the material must be furnished on the credit of the building and not on the credit of the owner or other contracting party.

Duncan Bros. v. *Aaron,* 6 Houston (Del.), 566.

Hills v. *Elliott,* 16 Serg. Rawle (Pa.), 56.

Eufala Water Co. v. *Addyston P. & S. Co.,* 89 Ala., 552.

It must also be furnished with the distinct understanding and intention that it is to be used in the particular building or vessel upon which the lien is sought to be enforced.

Cook v. *Rome Brick Co.,* 98 Ala., 409.

Weaver v. *Sells,* 10 Kas., 609.

Holmes v. *Richet,* 56 Cal., 307.

Choteau v. *Thompson,* 2 Ohio St., 114.

Lanier v. *Bell,* 81 N. C., 337.

Mills v. *Terry Mfg. Co.,* 91 Tenn., 469.

The case of the *Eufala Water Company* v. *Addyston, etc., supra,* was a lien against property under which water pipes had been laid, and, in his opinion, McClellan, J., used the following language:

> "The proposition that a lien attaches only where the materials have been furnished for the purposes to which they are devoted, and that it does not arise when they have been supplied on the general credit of the purchaser and without reference to any contract, express or implied, for their use on a particular building or for the improvement of certain land, cannot be denied."

The same jurist, in the case of *Rome Brick Company, supra,* said:

> "It (the contract) must have had reference to the particular building, to the erection of which the materials were devoted, and which is no doubt to be subject to the payment of the price thereof, and not merely to a house which the contractors were building in a named city."

In this case the building upon which the lien was sought to be enforced was in the city named in the contract.

The Kansas and Michigan statutes are almost identical, and in the case of *Weaver* v. *Sells, supra,* Ballentine, J., in denying a lien claim, said:

> "In order for the vendor to obtain a lien * * * he should sell and furnish it (the material) with the intention and understanding that it should be used in constructing the building against which he claims a lien."

California also has a statute similar to the Michigan statute, and in that state Chief Justice Mor-

rison, in the case of *Holmes* v. *Richet, supra,* said that:

> "To entitle a material man to enforce a lien upon a building for materials furnished it must be alleged and proved that not only have the materials been used on the construction of the building, but they must have been, by the express terms of the contract, furnished for the particular building upon which the lien is claimed."

Citing *Houghton* v. *Blake,* 5 Cal., 240.

The case of *Mills* v. *Terry Mfg. Co., supra,* declares the law of Tennessee to be that the seller of materials to a contractor is not entitled to a lien upon the property repaired or constructed therewith where there is no special contract between the dealer and the owner of the property that such material should be used in construction or repairs of the particular property.

In the case of *Hills* v. *Elliott, supra,* the following language is used:

> "The material must be furnished on the credit of a particular house; such must be the understanding at the time. The charges must be made in such a manner that the owner, if he applies to the materialman before he pays the architect, may be able to discover the liability of his house. The law fixes the lien on the sale and delivery of the goods for a particular house."

In this case the court draws parallels in this way:

> "A lumber merchant purchases on credit 100,000 feet of boards to sell and make a profit. He changes his intentions and erects two or three houses and uses half of the boards therein. If his creditor for this lumber has a lien on those

houses he has what neither himself nor the buyer nor, as I believe, the legislature ever intended.

"A storekeeper purchased in Philadelphia, in the usual course of his business, glass, locks, etc. He erects a house or houses. The merchant was not intended to have a lien on those houses for the price of so much of those articles as may be used."

The law of Ohio, as announced in the case of *Choteau* v. *Thompson, supra,* is as follows:

"If a materialman sells his wares with no understanding as to their application he can assert no lien upon the building or vessel in which they may be placed. It is only where the materials are furnished for a purpose named in the act that a lien is acquired."

Under the statutes of Idaho when materials are sold under a general sale, without any reference as to what use or where they are to be used, there is no lien.

Columbia Iron Works v. *Richenberg,* 43 Pac., 681.

In Illinois it is held that a mechanic's lien does not exist for lumber furnished upon an open account without reference to its being placed in a particular building.

Hill et al. v. *Bishop et al.,* 25 Ill., 349.

Dymond v. *Bruhns,* 101 Ill. App., 425.

New York:

There can be no lien unless the seller and purchaser both understand that at the time of the delivery of the material they were to be used in a particular building.

Watrous v. *Elmendorf,* 55 How. Prac. Rep., 461.

Ohio:

In the case of *Choteau* v. *Thompson,* 2 Ohio St., 114, the court holds that if material be furnished without a contract if it shall be put to a particular use of erecting a craft or building no lien on the building or vessel exists.

California:

It is not sufficient to show that materials were sold to be used on the property. It must be shown that they were actually used there.

Sylvester v. *Cal. Quartz Mining Co.,* 80 Cal., 510; 22 Pac., 217.

Missouri:

There is no lien for materials which did not enter into the construction.

Fitzpatrick v. *Thomas,* 61 Mo., 515.

Connecticut:

To the same effect is *Chapin* v. *Persee & B. P. W.,* 30 Conn., 461.

Nebraska:

Weir v. *Barnes,* 38 Neb., 875.

Vermont:

Hinckley E. I. Co. v. *Janus,* 51 Vt., 240.

In Michigan there can be no lien unless the seller understood that the property sold was to be used in a particular building, and the same was made with that understanding.

VanCleve Glass Co. v. *Erratt,* 110 Mich., 689.

V.

THE COMPLAINANTS HAVE NO LIEN ENFORCIBLE UNDER THIS ACT FOR ANY CONTRACT MADE OR MATERIAL FURNISHED AFTER THE VESSEL WAS LAUNCHED ON MARCH 21ST, 1903.

The complainants, the Delaney Forge Company, have furnished a bill of particulars (Rec., 7), in which is set out the various shipments of forgings made to the Columbia Iron Works. The last four items being subsequent to February 28th, and amounting to the aggregate of $184.27, are admittedly furnished after March 21, 1903, when the steamer was launched, and became a vessel subject to the admiralty jurisdiction. She was afloat in navigable water, being in the St. Clair River at St. Clair, and was in a condition so that she could have been completed by anyone. These items clearly were for things furnished after that time, and therefore are not a lien which can be enforced by process in the state court under the decisions hereinafter referred to.

In the case of *Edwards et al.* it appears (Rec., 176) that on April 2nd, or at least after the items amounting to $1,385 were furnished, there was in all furnished to the Columbia Iron Works items amounting to $214.65 (Rec., 176, 177). These items were all furnished after the vessel was launched and when she was in the water, afloat and in process of completion, and for these there can be no lien enforceable by this proceeding under the decisions of this court.

In the case of the *Globe Iron Works* v. *Steamer,* 100 Mich., 583, the court, on page 590, says:

> "After the vessel is launched, contracts for equipment or repairs or material are maritime. Before the vessel is launched, they are contracts upon land and are non-maritime. The distinction is so clearly pointed out in the numerous authorities above cited, and the rule so firmly established, that we deem further discussion unimportant. (*Lake* v. *The Manhattan,* 46 Fed. Rep., 797.)"

It seems almost unnecessary to add any argument to what Judge Grant has said in the foregoing case. The Winnebago at the time she was launched had then been named, was afloat, and though she had not on board any of her machinery, was *in esse,* had become a thing of commerce, and could have been removed from this place to any other place, and put to various uses in the lines of transportation. It was not necessary to make a propeller of her. She could have been converted into a tow barge, a side wheel steamer or a transport of any kind, with or without steam propulsion.

Tucker v. *Alexandreff,* 183 U. S., 424, is directly in point and seems conclusive that after a vessel is launched she comes within the jurisdiction of the navigation laws and a subject for maritime liens and torts which can be enforced in a court of admiralty. On page 427 the court say:

> "A ship is born when she is launched, and lives so long as her identity is preserved. Prior to her launching she is a mere congeries of wood and iron—an ordinary piece of personal property—as distinctly a land structure as a house, and subject only to mechanics' liens created by state law and enforceable in the state courts. In the baptism of launching she receives her name, and from the moment her keel touches

> the water she is transformed and becomes a subject of admiralty jurisdiction. She acquires a personality of her own; becomes competent to contract, and is individually liable for her obligations, upon which she may sue in the name of her owner, and be sued in her own name."

We contend in this case that there was no evidence to show that any items except 1 steel coupler shaft, 1 steel outboard shaft, 1 rudder frame, 1 steel thrust shaft, were on board the steamer at the time she was launched. A large part of these forgings were for the engines of the steamer. These were being built upon land in the yards of the Columbia Iron Works, and were not placed on board of the steamer until after she was launched, and we contend that a lien only attaches after the material is placed on board, and it not appearing that this material had been placed on board. As to all such items there can be no remedy under this statute, because the lien could be enforced in admiralty.

In the case of *Edwards et al.* there is no proof that the two items of steam capstans were placed aboard of the Winnebago before she was launched. In fact the letter on p. 134, Record, shows that it arrived at St. Clair on the 24th of March, three days after the Winnebago was launched. In fact, from the whole testimony it is to be inferred that these windlasses were placed on board after she was launched and therefore these items cannot be recovered for. See

Perry v. *Haynes,* 191 U. S., 17.

VI.

THE STEAMER WINNEBAGO, ENGAGED IN INTERSTATE COMMERCE, WAS NOT SUBJECT TO SEIZURE WHILE PASSING FROM PORT TO PORT THROUGH THE WATERS WITHIN THE JURISDICTION OF THE COURTS OF THE STATE OF MICHIGAN.

The evidence shows that the steamer Winnebago was a steel vessel 200 feet long, 39 feet wide, of more than 1,000 tons burthen, and was built for the general lake trade in which she has since been engaged.

The evidence clearly shows that at the time of her seizure the Winnebago was engaged in interstate commerce.

She was carrying cargoes destined to other states than Michigan. This state was at most only one terminus of her voyage in the cases when she discharged her cargo of coal at Lake Linden, or took on a cargo of ore at Marquette bound to Tonawanda, New York. She was engaged in such commerce as brought her under the commercial clause of the Constitution.

The Daniel Ball, 10 Wall., 557.
The Montello, 20 Wall., 430.

The process in this case ran against the Winnebago *in rem,* and the sheriff of Wayne County was commanded to seize her. It was not an attachment of property as an incident or part of a (???) She was at the time engaged in interstate commerce and had on board a cargo destined for a foreign state. This was in transit. It has been held that loaded cars of a foreign railroad cannot be seized under a writ of attachment out of a state court.

It was held that this was an interference with in-

terstate commerce under the Constitution and laws of the United States.

Mich. C. R. Co. v. *Chicago M. L. S. Co.*, 1 Ill. App., 339.

Wall v. *Norfolk & W. R. Co.*, 52 W. Va., 485; 44 S. E., 294, and also in 64 L. R. A., 501, together with an elaborate note on the subject.

Connery v. *Quincy O. & K. C. R. Co.* (Minn.), 64 L. R. A., 624; 99 N. W., 365.

These authorities apply to the Winnebago with greater force than they do to railway cars, because the Winnebago, as a ship engaged in interstate commerce, is at all times strictly within the provisions of the Acts of Congress, while a railway car of itself is but a part of a means of transportation, for without tracks and locomotives it cannot carry on commerce of any kind. The ship, however, travels the national and international highways under the constitutional right of navigation, and, under the Acts of Congress, must be enrolled and licensed, be provided with certain life-saving and fire-extinguishing apparatus, and must be commanded by officers who are examined and licensed by the laws of the United States. The ship, therefore, should be exempt from seizure by process from a state court while actually engaged in commerce, and still more so if she is not within any of the ports and places of the State of Michigan, but only passing through waters within its boundaries. We do not believe that the states have any authority to interfere with the constitutional right of navigation when that right is exercised by a ship which is not bound to, or within the limits of the state except as it passes through the same in going from one state to another.

VI.

THE CONTRACT TO BUILD A SHIP IS A MARITIME CONTRACT, AND THEREFORE THERE IS A LIEN FOR MATERIAL AND LABOR FURNISHED WHICH CAN BE ENFORCED IN A COURT OF ADMIRALTY, THERE BEING A LIEN UNDER THE STATE LAW.

The Winnebago, a steel steamer 200 feet long and of 1,059 tons burden, was built and launched at St. Clair, Michigan.

Under the laws of Michigan her builders and those furnishing material and labor to her that entered into and became a part of her, had a lien upon her.

If the contract for her construction or for furnishing the material and labor for her construction is maritime, then the admiralty courts of the United States have the sole right to enforce these liens.

It will be claimed that the contract was not maritime under the decision of this court in *People's Ferry Co.* v. *Beers,* 20 How., 40.

People's Ferry Co. v. Beers Reviewed.

In the case of *People's Ferry Co.* v. *Beers,* decided in 1858, the only question before the court was, whether there was a lien on the steamer Jefferson for the unpaid portion of the contract price for building her. The court decides that a lien provided in the building contract only amounted to a mortgage. There was no lien under the laws of New Jersey, where the vessel was constructed.

So that if there was no lien under the maritime law of the United States the libel must be dismissed. Mr. Justice Catron, after quoting at length from the opinion of the District Court, holding that the con-

tract *was maritime,* and that therefore there was a maritime lien on the vessel, begins by saying:

> "The question presented involves a contest between the state and federal governments."
>
> "The latter has no power or jurisdiction beyond what the constitution confers. * * *
>
> "The extent of power withdrawn from the states and vested in the general government depends on a proper construction of the constitutional provision above cited. Its terms are indefinite and its true limits can only be ascertained by reference to what cases were cognizable in the maritime courts when the constitution was formed—for what was meant by it then it must mean now. What was reserved to the states to be regulated by their own constitutions cannot be rightfully infringed by the general government, either through its legislative or judiciary department. *The contest here is not so much between rival tribunals, as between distinct sovereignties,* claiming to exercise power over contracts, property and personal franchises."

This statement is conspicuously remarkable because it starts out with the assumption that some one has raised the then burning question of state rights.

The great case of *Dred Scott* v. *Sandford* had only a short time before (at the previous term) been heard and decided, and the public was aroused, and the press at the time was filled, with comments for and against the decision of the court in that case. And all the people of the southern states, and many in the north had very decided convictions opposed to any further encroachments of the general government upon what they believed to be the rights of the states.

It is, herefore, not remarkable that this case presented as one that was to deprive the states of the right to legislate and enforce in its courts exclusively contracts so important as those relating to the building of ships, should emphasize the question of conflict between the state and the general government, and in order to raise the dignity of the contest, it was said that "*it was not so much between rival tribunals as between distinct sovereignties.*"

It was, therefore, no easy task to convince a court made up of justices who, all of whom, or nearly all of whom, had, or still affiliated with the political party then in power, whose adherents were exceedingly jealous of every attempt to deprive the states or their courts of what it was believed were their rights under the constitution.

It was the political aspect of the question that was of greater importance than the judicial, or historical; and it was therefore uppermost in the mind of the learned justice who wrote the opinion. That is why the decision begins as it does.

Considering the time when the decision was made, and the trend of public opinion on the question of state rights at that time, it is not extraordinary that the court decided the contract non-maritime, for only in that way could the case be disposed of so as to favor what was then believed to be the rights of the states.

We do not mean to cast any reflection upon the integrity, fairness or learning of the members of the court, as then constituted, but we cannot close our eyes to the fact that judges are human and mere men and had political views before they became

judges, and these with men at middle life and beyond are not lightly set aside, and we believe they influence and shape opinions and judgments, even in the best and justest of men and judges.

It is somewhat remarkable that at the same term of court that *People's Ferry Co.* v. *Beers* was decided the court, by a vote of five to four justices, in the case of *The Fashion*, 21 How., 244, held that a contract of affreightment for a carriage of goods from Two Rivers, Wisconsin, to Milwaukee, in the same state, was not a maritime contract.

At the same term the court also decided the case of *The Goliah*, 21 How., 253, and held that coal furnished for fuel, tot a steamer engaged in commerce on the Sacramento river, exclusively plying within the State of California, could not be recovered for, because the steamer was engaged in the internal commerce of a state.

The court then amended its 12th admiralty rule, so that no right to proceed *in rem* in cases of home supplies existed, saying:

> "We have determined to leave these liens depending on state laws, and not arising out of the maritime contract, to be enforced by the state courts."

So that we find that the court in these three cases deprived the Admiralty Courts of three most important contracts:

1st. The contract of carriage by water between places in the same state.

2d. The contract for furnishing supplies to a vessel so engaged.

3d. Contracts to build a ship.

Not content with this, the court also repealed its 12th rule so far as it applied to supplies furnished in the home port, and said:

> "We have at this term amended the 12th rule of the admiralty so as to take from the District Courts the right of proceeding *in rem* against a domestic vessel for supplies and repairs which had been assumed upon the authority of a lien given by state laws, it being conceded that no such lien existed according to the admiralty law, thereby correcting an error which had its origin in this court in the case of *The Gen. Smith* (4 Wheat., 439), applied and enforced in the case of *Peyroux and others* v. *Howard and Varion* (7 Peters, 324), and afterwards partially corrected in the case of the steamboat *New Orleans* v. *Phoebus* (11 Peters, 175, 184)."

The first two cases were subsequently, in 1868, overruled in principle in the case of *The Belfast*, 7 Wall., 624, in which the court held that a contract to carry goods between Vienna, Alabama, and Mobile, in the same state, on the waters of the Tombigbee river, was maritime and exclusively within the jurisdiction of courts of admiralty.

The court seeks to distinguish this case from that of *The Fashion* by saying that the latter arose under the act of 1845, which conferred admiralty jurisdiction on the lakes in case of vessels of twenty tons' burthen engaged "in commerce and navigation between ports and places in *different* states and territories."

This position, however, is entirely destroyed by the court's holding in the case of *The Eagle*, 8 Wall., 15, *that the act of 1845 did not extend the jurisdiction*, saying, page 25:

"We have now examined it with care and given to it our best consideration, and are satisfied that since the decision of the case of *The Gennesee Chief,* the court must regard the District courts as having conferred upon them a general jurisdiction in admiralty upon the lakes and the waters connecting them, by the ninth section of the original act of 1789; and the enabling act of 1845, therefore, has become inoperative and ineffectual as a grant of jurisdiction; and, as it was an act, on the face of it, and as intended, in its purpose and effect, to extend the admiralty jurisdiction to these waters, we cannot without utterly disregarding this purpose and intent, give effect to it as a limitation or restriction upon it. We must, therefore, *regard it as absolete and of no effect,* with the exception of the clause which gives to either party the right of trial by jury when requested, which is rather a mode of exercising jurisdiction than any substantial part of it. The saving clause in this act, as to the concurrent remedy at common law, is, in effect, the same as in the act of 1789, and is, therefore, of necessity, useless and of no effect."

Unfortunately, within a year after *People's Ferry Co.* v. *Beers* was decided there came before the court the case of *Roach* v. *Chapman,* 22 How., 129, which was a libel for the balance of the contract price for the construction of the boiler and engines of the steamboat *Capitol.*

It was claimed that there was a lien on the steamboat under the laws of Kentucky, where the steamer was built, and that the cause of action arose prior to the amendment of the 12th rule in admiralty. (*Goliah,* 21 How., 248.)

The court, however, following the case of *People's*

Ferry Co. v. *Beers,* held the contract as being non-maritime, and said, p. 132:

> "It is said here that the law of Kentucky creates a lien in favor of the libelants; and that, as this case originated before the adoption of our rule, which took effect on the first of May, 1859, it may, upon the principles recognized by this court in *Peyroux* v. *Howard* (7 Peters, 343), be enforced in the admiralty. But (to quote the language of the court in *Orleans* v. *Phoebus,* 11 How., 184): 'That decision does not authorize any such conclusion. In that case the repairs of the vessel, for which the state laws created a lien, were made at New Orleans, on tide waters. The contract was treated as a maritime contract, and the lien under the state laws was enforced in admiralty, upon the ground that the court, under such circumstances, had jurisdiction of the contract, as maritime; and then the lien, being attached to it, might be enforced according to the mode of administering remedies in the admiralty."

The contract for supplies furnished in the home port was held not to be maritime in the case of *The Goliah,* because the steamer was engaged in the internal commerce of the state on the Sacramento river, while in *Peyroux* v. *Howard* an identical contract was held to be maritime because *the tide ebbed and flowed at New Orleans, where the supplies were furnished.*

It was therefore not the employment of the vessel, but the tide that determined the character of the contract and decided whether it was maritime or not.

This position has, of course, been entirely abandoned and now the furnishing of supplies in the home port of any vessel on navigable water of the United States is a maritime contract and within

admiralty jurisdiction. The court, however, still adheres to the artificial difference between home and foreign supplies by denying the former a maritime lien.

The J. E. Rumbull, 148 U. S., 1.

Had the case of *Roach* v. *Chapman* come before the court at the same time the *Belfast* and *Eagle* cases were there, and had it been properly presented to the court, there can be no doubt (in the light of these cases) that the court would not have said what it did, and might have decided to practically overrule the *Beers* case, as it did the cases of *The Fashion* and *Goliah.*

It was not long after this, in 1872, that the 12th rule in admiralty was again amended so as to read as it does now, to include all contracts for supplies, etc., whether home or foreign.

Since the decision of *Roach* v. *Chapman* the same question has not been fairly before the court, although the court has in a number of cases referred to the *Beers* case as holding that the contract to build a ship is not maritime.

The question, however, was never presented squarely for argument or decision, and these expressions are therefore *obiter dictum,* but may have prevented the question from being presented to the court for reconsideration.

We believe that had the case of *People's Ferry Co.* v. *Beers* been brought before the court ten years later than it was, or at any time since then, the court's decision would have been the opposite to what it was. It was the political aspect of the case that took precedence in the minds of the members

of the court, and not the judicial, hence it may be said to be a political rather than a judicial decision.

In our own country, prior to the decision of *People's Ferry Co.* v. *Beers,* we find a long line of decisions in the lower courts holding that the contract for furnishing materials for the construction of a ship was a maritime contract. These decisions reflect the opinions of five different judges, and among their number are the illustrious names of Judges Story, Ware and Sprague, pioneer jurists, who had more to do with shaping the early jurisprudence in admiralty in this country than any other of the federal judges, and to whose learning, industry and wisdom we are indebted for much that is wise and admirable in our jurisprudence.

These judges, residing in states bordering on the sea, were more familiar with the history of maritime jurisdiction, the prevailing customs and usages among seamen, than were the judges of the higher tribunal, and their opinions are entitled to the greatest weight. Whether these decisions were called to the attention of the court at the time *People's Ferry Co.* v. *Beers* was decided we do not know, but they have lost none of their value as precedents in showing how the contract was considered in the trial courts for nearly fifty years.

Davis v. *New Brig,* Fed. Cas. 3643, decided in 1834 by Hopkinson, J.

Read v. *Hull of a New Brig,* Fed. Cas. 11609; 1 Story, 244, decided in 1840 by Story, J.

The Calisto, Fed. Cas. 2316, decided in 1840 by Ware, J.

The Hull of a New Ship, Fed. Cas. 6859, decided in 1842 by Ware, J.

Van Pelt v. *The Ohio*, Fed. Cas. 16870, decided in 1850 by Judson, J., in Ohio.

The Abbie Whitman, Fed. Cas. 15, decided in 1854 by Sprague, J.

Sewall v. *The Hull of a New Ship*, Fed. Cas. 12682, decided in 1855 by Ware, J.

Purinton v. *The Hull of a New Ship*, Fed. Cas. 11478, decided by Ware, J., 1855.

The Richard Busteed, Fed. Cas. 11764, decided in 1858 by Sprague, J.

Drew v. *Hull of a New Ship*, Fed. Cas. 4078, decided in 1860 by Sprague, J.

The Chas. Mears, Fed. Cas. 10766, decided in 1856 by Willson, J., in Ohio.

The analysis of the opinion of this court in *People's Ferry Co.* v. *Beers* resolves itself into three reasons for declaring a contract for building a ship non-maritime:

First. That the admiralty jurisdiction of the maritime courts of this country at the time of the framing of the constitution did not include such a contract.

Second. That the contract was made on land, to be performed on land.

Third. That there can be no lien on a ship when the owner is present.

We believe that we can show that some of these reasons were not valid when given and were therefore unwarranted, and that since this case was decided each one of them has been, in subsequent cases, declared by this court as not the law.

I.

THE CONTRACT WAS NOT MARITIME BECAUSE IT WAS NOT SO CONSIDERED AT THE TIME THE CONSTITUTION WAS ADOPTED.

We think that the above correctly states the first reason given by Mr. Justice Catron for deciding that the contract to build a ship was not maritime.

This reason had no support whatever unless it was conceded that the sole guide for determining the limits of admiralty jurisdiction in this country was the jurisdiction in admiralty in England.

We may as well admit at the outset that this contract had no standing in the English admiralty courts when the constitution was formed, because under the Statutes of Richard the admiralty jurisdiction only extended to "contracts of wages, bottomry bonds and other contracts made and to be performed on the high seas."

N. J. Steam Nav. Co. v. *Merchants Bank,* 6 How., 378.

On page 389 the court says:

> "1. That the arguments used in the present case against the jurisdiction, and in favor of restricting it to the common law limit in England at the Revolution, have been heretofore presented to the court, on several occasions, and at a very early day, and on each, after careful consideration, were rejected, and the judgment of the court placed upon grounds altogether inconsistent with that mode of construing the constitution; and,
>
> "2. They affirm the practical construction given to the constitution by Congress, in the act of 1789, which, we have seen, assigns to the district courts, in terms, a vast field of ad-

miralty jurisdiction unknown to that court in England.

"The jurisdiction in all these cases is maintained on the broad ground that the subject-matter was of admiralty cognizance, as the causes of actions rose out of transactions that had occurred upon the high seas, or within the ebb and flow of the tide; expressly rejecting the common law test, which was attempted to be applied, namely, that they arose within the body of a county, and, therefore, out of the limits of the admiralty."

On page 390 the court says:

"2. Another class of cases in which jurisdiction has always been exercised by the admiralty courts in this country, but which is denied in England, are suits by ship carpenters and material men, for repairs and necessaries made and furnished to ships, whether foreign, or in the port of a state to which they do not belong, or in the home port, if the municipal laws of the state give a lien for the work and materials. 1 Pet. Adm. R., 227, 233, note; Bee's Adm. R., 106; 4 Wash. C. C. R., 453; 1 Payne, 620; Gilpin, D. C. R., 203, 473; 1 Wheat., 96; 4 *ibid.*, 438; 9 *ibid.*, 409; 10 *ibid.*, 428; 7 Pet., 324; 11 *ibid.*, 175."

The limits of admiralty jurisdiction at the time of the revolution were so narrow in England, that the jurists in this country found it necessary to either emasculate the admiralty jurisdiction, or boldly construe the judicial grant as embracing more than was given in England. In order to do this reference was had to the admiralty jurisdiction exercised during the time of the colonies, and it was claimed that the framers of the constitution, being familiar with the colonial admirality jurisdiction, had it in mind at

the time of the introduction into the constitution of the admiralty clause, and it has been urged that the admiralty jurisdiction of the colonial courts embraced many subjects not to be found in the admirality jurisdiction of the mother country, including waters and territory other than that in which there was a tide.

The commissions issued by the King to the governors of the colonies, notably that of New York, Connecticut and East and West Jerseys, grant authority in the broadest and most comprehensive terms on the questions of jurisdiction in maritime matters.*

It will be noticed that in the commission issued by King Geo. III to Richard Morris (Ben. Ad., 82) power was granted "to take cognizance of and proceed in all cases * * *" according to the civil and maritime laws and customs of our High Court of Admiralty of England, *anciently used*, and by all other lawful ways, etc. And again (Sec. 158):

> "To proceed in the same according to the civil and maritime laws and customs of our aforesaid court, *anciently used*, as well as those of mere office mixt or promoted."

The point is well taken by Mr. Benedict (Sec. 161, Ben. Ad.), where he says:

> "In these commissions and letters patent were found the source, extent, and definition of the admiralty and maritime jurisdiction in the colonies. I am not aware that, up to the Revolution, any British statute in relation to the admiralty jurisdiction named the colonies; and the well known principles that statutes do not

* See copy of these commissions in Ben. Ad. under the head of Colonial Admiralty Jurisdiction.

bind the colonies unless they are named, and that the king's commission runs through his whole dominions, are sufficient to make these commissions the legitimate source and law of the admiralty jurisdiction in the colonies. They declare that jurisdiction to extend to all causes, civil and maritime, embracing charter parties, bills of lading, policies of assurance, accounts, debts, exchanges, agreements, complaints, offences, and all matters which in any manner whatsoever relate to freight, transport money, maritime loans, bottomry, trespasses, injuries, extortions, demands and affairs whatsoever, civil and maritime. These general words are of the most comprehensive character, and include all matters which are in their nature maritime, while all those causes of which jurisdiction has been denied to the English admiralty, are especially enumerated as admiralty and maritime causes."

That the admiralty jurisdiction in England at the time of the Revolution is no longer the criterion is well established. The court has said that the admiralty jurisdiction of the colonial courts prior to the Revolution was much broader, and comprehended a greater variety of subjects than were embraced within that jurisdiction in the Home Country, and it is said that this broader jurisdiction was in the minds of the framers of the constitution, and that the broad language of the constitutional provision was intended to embrace a jurisdiction at least as broad as that of the Colonial Vice-Admiralty Courts. We deem it fair to say that since the decision of *People's Ferry Co.* v. *Beers,* and beginning with the decision in the case of *The Genesee Chief,* the jurisdiction of the Admiralty Courts has been greatly extended, and that authority for this extension is

placed upon the broad ground that the language of the constitutional provision did not limit the court to the limits of admiralty jurisdiction of England, the Colonies, or any one country, but that it embraced them all, and every source that could be brought to the attention of the court and considered as throwing light upon what was properly within that jurisdiction. So that the court may have before it conveniently the learned views of Mr. Benedict, the author of Benedict's Admiralty, upon the subject of shipbuilding contracts, and at the same time the historical review and the various authorities, we take the liberty of printing here what this author has said on the subjects of contracts for building ships, beginning at section 264.

"The building contract is a maritime contract." Whether it be verbal or written, express or implied, "all matters that concern owners and proprietors of ships, as such, and shipwrights, are within the admiralty jurisdiction."

Davis v. *A New Brig,* Gilp., 473.
Harper et al. v. *A New Brig., id.,* 536.
The Hull of a New Ship, Davies, R., 199.
Godol, 43; Benedict Ad., Sections, 50-95-105-151.

In the cases of the *People's Ferry Co.* v. *Beers,* and *Roach* v. *Chapman,* the Supreme Court says that the contract for building a ship is not a maritime contract, because it is a contract "made on land to be performed on land; the wages of the shipwrights have no reference to a voyage to be performed." It cannot, however, with strict propriety, be said that a ship is built on the land. Her

keel is indeed laid in an inclined plane on the shore, and her frame is forcibly kept from the water, until her hull is so far advanced as to be buoyant. At the proper time she is allowed to slide into the water, where she is made a ship. *Finis coronat opus.* From the time when her keel is laid to the last work upon her rigging, not a timber is framed, not a spike or treenail is driven, nor a plank, a rope, a block, or an earing is put in place, except for the direct, useful, maritime purpose of making her a seaworthy ship. On the land she is useless; she can neither stand nor go. On the water she is the perfection of usefulness, as the great agent of maritime commerce, to whose wants and exigencies, and perils, she must be well adapted by the builder. And this is his contract, and his wages have reference to all her voyages to be performed. The navigable waters, and their perils, and the ship and her owners, and sailors, and cargo, are all there is in maritime commerce and admiralty jurisdiction, and Valin may well say, "what would be the function of admiralty courts, if they had not the jurisdiction of the building, rigging, furnishing, outfit, sale, and adjudication of vessels?" The maritime law, as laid down by all the great civilians and jurists, embraces contracts for building, repairing, supplying, and navigating ships.

De Lovio v. *Boit*, 2 Gall., 475.

By the Civil Law:

> "Whoever gives credit for building, or furnishing, or repairing a ship, has a lien upon it."
>
> "What any one gives credit for, for the purpose of building, repairing, furnishing, or out-

fitting, or even selling a ship, is a lien upon it."

By the Consulat:

"If a ship, newly built, is sold at the suit of creditors, before it has been launched, or before it has made a voyage, the mechanics, caulkers, and other workmen, as well as those who have furnished timber, pitch, spikes, and other things necessary for the building of the ship, shall be preferred to all other creditors whatever, even to those who may have lent money, with a written declaration that it is to be used in the building of a vessel."

Cleirac, to the same effect, says:

"Hypothecation is special and privileged for the wages of the carpenters, caulkers, and other workmen, and for those who have furnished tar, pitch, casks, timber, spikes, oakum, and other materials for the building or repairing a vessel."

The Marine Ordinance of 1691 is equally clear:

"The judges of the admiralty have jurisdiction exclusively of all others, and between all parties, of everything which concerns the building, tackle, apparel, furniture, outfit, victualling, sale, and adjudication of vessels."

In like manner, Valin, commenting on this article of the ordinance:

"There is never any dispute in relation to the objects expressed in this article, which concern the *building, rigging, furniture, outfit,* sale, and adjudication of vessels (the italics are his); and in truth what would be the function of admiralty courts, if they had not jurisdiction of such causes?"

Emerigon quotes with approbation, and as authority, the foregoing and other similar passages, in Chapter 12, Sections 3, 4, 5, of this treatise on maritime loans, and on page 566, quarto edition, says:

> "There is nothing so much favored as the price of work and materials for the building of a vessel. Commerce and the state are interested in it. It is just that the workmen and material men should enjoy the lien upon the thing, which is given them by the Marine Ordinance. They cannot be deprived of this privilege except when it is proved that they trusted the person, not the thing."

Boulay-Paty, in more recent times, in his commentaries on the Commercial Code, in which the jurisdictional clauses of the ordinance are re-enacted, Sections 1 and 2, as does also the Nouveau Valin, bring down to our own time, in equivalent words, this maritime law of all the ages.

Even the English judges, with the king and his council, in the resolutions of 1632, say (Resolution 3, *ante*, p. 95):

> "If suit shall be in the Court of Admiralty, for building, amending, saving or necessary victualling of a ship, against the ship itself, and not against any party by name, but such as for his interest makes himself a party, no prohibition is to be granted, although this be done within the realm."

And if we pass behind these great commentators to the original codes of all the maritime states and cities, which the wonderful industry and learning of Pardessus have brought together, in his great work (6 vols. quarto), "Collection de Loix Maritimes,

Anterieures au XVIIIe Siecle," we find that the history, the text and the commentary of the codes and collections of maritime usages, from the earliest periods of antiquity, leave no room to doubt the maritime character of contracts for building, repairing and supplying ships, and their lien upon the ship. And it can hardly fail to excite surprise that the decisions of the most learned judges, who have made the admiralty law under the constitution and the decisions of the Supreme Court the study of their lives, should have been overruled on the authority of *two little-considered decisions of an inland judge of a state court,* before the constitution had any existence.

If it were conceded that "liens on vessels encumber commerce and are discouraged," it could not overrule the maritime law. But liens, instead of encumbering commerce, facilitate it. They furnish to the ship-builder and ship-owner a necessary facility and security for credit, in carrying on their enterprises till the completion of the ship, when she can be sold and payment made from the proceeds; or, in case of repairs or supplies, till the earnings of a voyage may be appropriated to the payment of her bills. If no builder or ship-owner could use his vessel as a means of getting money, or credit everywhere, not only where he is not known, but where he is known, not only where the vessel does not belong, but in her home port, when the owner himself negotiates the transaction, none can know so well as those familiar with maritime commerce what beneficial enterprises must fail and what commercial intelligence and skill must go unemployed, or be brought to ruin by the unforeseen accidents of

the sea. In the language of Emerigon, "it is just that the workmen and material men should enjoy the lien upon the thing which is given them by the Marine Ordinance. They cannot be deprived of this privilege, except when it is proved that they trusted the person, and not the thing." The lien is always presumed, but it may be disproved. "There is nothing so much favored." "Commerce and the state are interested in it." Sir Leoline Jenkins has ably pointed out the inconvenience to the public and to trade, if the admiralty jurisdiction be evaded—among other things, as to building and victualling ships, and as to material men, that is, those who furnish materials or supply work for ships.

De Lovio v. *Boit,* 2 Gal., 466.

Sec. 265, the same:

> "The builder may sue the owners *in personam* in the admiralty, to recover whatever is due to him for his services, or for violations of the building contract in the construction of the vessel, and he has also a lien or privilege for the building service against the ship herself, which may be enforced in the admiralty. The building contract being maritime, it is evident that the owner may sue the builder in the admiralty for violations of the contract in building the ship. The distinction between maritime contracts and agreements leading to or preliminary to maritime contracts, and contracts wholly or partly performed and those not entered upon, has been adverted to, and must not be lost sight of."

As long as these decisions stand they will continue one of the most remarkable differences between the maritime law as held in this country and

that of the most maritime countries. It is now over forty years that the case of *The People's Ferry Co.* v. *Beers* was decided. But twenty-six years had elapsed between the decision of the case of *The Thomas Jefferson* and that of *The Genesee Chief,* which reversed it. *It is not, therefore, impossible that the question whether a contract to build a ship is maritime may again be brought before the Supreme Court for examination.* If the question should ever be brought before the court again, the considerations which have led that court to the larger views of the admiralty jurisdiction which now obtain, may very well lead to the adoption of the opposite view. In every maritime country except our own, the admiralty courts have jurisdiction over contracts for the building of ships. Even the English admiralty exercised that jurisdiction after the Resolutions of 1632, as is stated in the petition of the merchants, *ib.,* 1690. (See *ante,* p. 108.) And under the commission of the Vice Admiralty Court of Massachusetts this jurisdiction was exercised, for in the records of the court is to be found a suit by a builder of a ship *in rem* for his price after it has been delivered.

Insurance Co. v. *Dunham,* 78 U. S. (11 Wall.), 10.

To hold such a contract to be maritime and within the jurisdiction of the admiralty would be again "*stare super antiquas vias.*"

Conkling's Work on Admiralty, in its last edition, was published in 1857, a year before the case of *People's Ferry Co.* v. *Beers* was decided, and the subject of the contract for building a ship is there-

fore not treated separately. The author, however, quotes from Judge Story's decision in *De Lovio* v. *Boit* (*supra*), in which such a contract is included with the other maritime contracts, and it may, therefore, be considered as included by the author.

Henry, in his work on Admiralty, briefly states, Sec. 21, what is decided in *People's Ferry Co.* v. *Beers.*

Parsons, in his work on Shipping and Admiralty, second edition, 1869, says, 2 Parsons Sh. & Ad., 327, as follows:

> "Can the builder of a ship sue in admiralty for a breach of the contract? We know of no reason on principle why there should be any difference between a contract for building and a contract for repairing, and should hold that, while a lien cannot be enforced for building if the builders and owners of the vessel reside in the same state, the admiralty should have jurisdiction where the parties to the contract live in different states, and that in cases of domestic vessels the admiralty should exercise jurisdiction *in personam,* as we regard the building of a vessel as much a maritime transaction as the repairing of the vessel."

Let us examine the ancient jurisdiction of England to ascertain its extent before the encroachments of the common law courts upon it.

The ancient jurisdiction of the English Admiralty Courts comprehended the same subjects as the old Consular Courts of the Mediterranean, on the model of which it was formed—governed by the ancient laws, customs and usages of the sea as laid down in the laws of (1) Rhodes and Oleron; (2) Wisbuy; (3) Hanseatic Ordinances; (4) Colsolato del Mare; (5) Marine Ordinances of Louis XIV—all of which

gave admiralty jurisdiction over contracts to build, as maritime contracts. See

Bruce and Williams Admir. (3rd Ed.), p. 198.

3 Reeves Eng. Law, 197.

Pardessus (Collection des lois maritime anter. au XVIIIe siecle).

Pardessus (Us et contumes de la mer.).

And this broad jurisdiction in the admiralty continued until the jealousy of the English common law courts prompted the restriction of admiralty jurisdiction by the Statutes of 13 Rich. II, c. 5, and 15 Rich. II, c. 3, to matters *wholly* (actually) done *on* the *sea.*

These restrictions were largely ignored by the admiralty courts—calling forth the Statute of 2 Hen. IV, c. 11 (since repealed by Admiralty Court Act, 1861; 24 Viet., c. 10), which laid the admiralty judges under a liability in damages for exercising their old jurisdiction which the Statutes of Richard II took away.

Yet, in spite of all this narrow attitude against their inherent jurisdiction, the admiralty courts still continued to assert that jurisdiction over "all contracts of freight-bottomry, mariner's wages, charter parties, and *all contracts for the building of ships,* and for repairs and supplies thereto," down to the time of the Commonwealth. (See Godolphin's Adm. Juris., Cap. IV, p. 45 *et seq;* also Cap. VIII, p. 91 *et seq.)*

This tendency of the Admiralty Court, even after the Statutes of Henry IV. brought down upon its head the supreme manifestation of the jealousy of the common law courts in the latter's recourse to

a doctrine that only escaped being monstrous by its absurdity, i. e., "the fiction of supposing the matter, *though done at sea,* to be done on *land!*" And, moreover, this fiction was not traversable!! (See Lord Coke's 4th Inst., 75, 135.)

This seems to have been the climax for the prosecution, for in 1575 the dispute was referred to the king (James I), which resulted in a written agreement between the contending judges to the effect that (among other provisions) "the admiralty might have and enjoy, without any let or prohibition, the cognition of *all* contracts and other things arising as well *beyond* as *upon* the seas, though made on *land.*" (See Edward's Admir. Juris., 21.)

In 1632 (Charles I) the judges signed another agreement of five clauses, the third of which gave admiralty jurisdiction over "suits for *building,* mending, saving, or necessary victualling of a ship," even "though *within* the realm." (Godolphin's Adm. Jur., cited above.)

This put the admiralty jurisdiction, in some measure, back where it began as an inherent matter—but soon after this propitious situation the civil war unfortunately threw the question into confusion again when the office of Lord High Admiral was abolished by the Commonwealth.

At the restoration judicial prohibitions again issued freely against admiralty courts in the interpretation of the Statutes of Rich. V and Hen. IV (and in disregard to the later *agreements* between the judges) to the extent that Lord Stowell suffered by a verdict against him for nearly $20,000 for exceeding what the courts of *law* held to be his jurisdiction when he entertained a suit in admiralty on a

claim for *necessary supplies,* and the jurisdiction of admiralty was withdrawn as to claims for "the building of, or repairs or supplies to, ships," and, in fact, as to *all* questions of title to ships.

That limitation, as to claims for *building* ships, was a fixed one (left unaffected by Statute of 3 and 4 Vict., c. 65, which removed judicial prohibitions) until the Statute of 24 Vict., c. 10 (4th sec.) restored the *building* contracts to the present jurisdiction of admiralty nearly where they were originally and where, unquestionably, they belonged. See

The Wasp, L. R. I. & E., 367.
The Two Ellens, L. R. 4 P. C., 161-168.
The Cella, 13 P. D., 82 (note opinion of Lord Esher at p. 86).
The Skipwith, 10 L. T., 43.
The Pacific, 1 Brow., 7 Lush., 243.
William & Bruce's Admir. (3d Ed.), 198.

NOTE:—See an essay in the preface to a translation of Clerk's Praxis. by John E,. Hall, editor of the American Law Journal, in 1808, wherein he shows that there were no traces, in that author's time, of such a limited jurisdiction as the Admiralty Courts of England possessed before the statute *now* in force returned, to a large extent, the original admir. jurisdiction.

It extended to all cases of "freight, charter parties, bottomry, mariner's wages, *debts due to material men for the building and repairing of ships.*"
See 1 Amer. L. J. (Hall's), 419.

This narration of events in the history of admiralty jurisdiction in England, over claims for *building* ships, shows that such jurisdiction was

originally in admiralty, and that, in the absence of statutes, it would be well fixed there today, as a matter of *general maritime law*. Indeed, that jurisdiction has been, to a degree, restored to admiralty by Statute of 24 Victoria, as cited above.

SCOTLAND AND IRELAND.

The Scotch and Irish admiralty courts had inherent jurisdiction over contracts to *build* ships from the earliest times until restricted by Statute of 1681. See

Cobb and Mitchell v. *Patrick Insurance Co.*, 11 S., 993.

The Shannon, 6 Jur., 82 (Irish).

The case of *People's Ferry Company* v. *Beers* was for the first time brought into prominent notice after its decision in the case of *Morewood* v. *Enequist*, 23 How., 491. This case arose out of a breach of contract of charter party, and it was contended that under the admiralty jurisdiction in England at the time of the adoption of the constitution, there was no jurisdiction over contracts of charter party or affreightments, and that by the decision in the *People's Ferry Company* v. *Beers* case the court had returned to the principle that it was to be governed by the limits of the jurisdiction in England existing at the time when the constitution was formed, when using the words, "for what was meant by it then, it must mean now."

Mr. Justice Grier, after giving the substance of the opinion of Mr. Justice Catron in *People's Ferry Co.* v. *Beers*, says, on page 495:

"The arguments used in stating the opinion

> of the court must be referred to the subject before it and construed in connection with the question to be decided. They had no reference whatever to any former decisions of this court on the question *now* (it is hoped for the last time) mooted before us."

It was apparent, therefore, to the court at that time, as indicated by Justice Grier's opinion, that there was room for argument, at least, that the court had not been sufficiently broad in its statement of the sources and limits of the admiralty jurisdiction at the time of the adoption of the constitution. It is evident, to anyone familiar with the history of the extension of the admiralty jurisdiction in this country, as it appears from the decisions of this court, that too narrow a view was taken of the subjects of admiralty jurisdiction, and in arriving at the conclusion that the contract to build a ship was not a maritime contract, the court lost sight of the broad admiralty jurisdiction of the colonial courts at the time of the adoption of the constitution, and that of the different maritime nations, as evidenced by their codes, in all of which the contract for building a ship is held to be a maritime contract and within the jurisdiction of admiralty courts. One is forced to the conclusion, in reading *People's Fe Company* v. *Beers*, that the court did reject this contract as being maritime, because it was not included among the contracts over which the English admiralty courts had jurisdiction at the time the constitution was adopted. The reasons or causes for this have been matter of conjecture only, but there is at least room for the belief that the position was taken because it was feared that the federal courts

were trespassing too much upon the rights of the state courts, an all important question before the people at that time.

Mr. Justice Bradley, in the case of *Insurance Company* v. *Dunham,* 1 Wall., 1, 28, says:

> "The case of *The People's Ferry Co.* v. *Beers* (23 Howard, 493), being pressed upon the court, in which it had been adjudged that a contract for building a vessel was not within the admiralty jurisdiction, being a contract *made* on land and to be *performed* on land, Justice Grier remarked: 'The court decided in that case that a contract to build a ship is *not a maritime contract;*' but he intimated that the opinion in that case must be construed in connection with the precise question before the court; in other words, that the effect of that decision was not to be extended by implication to other cases."

Since the decision of *People's Ferry Company* v. *Beers* there has been no attempt made to limit the sources from which the admiralty jurisdiction in this country is to be derived.

The *Beers* case was clearly a step backward in the progress of the movement to define the limits of admiralty jurisdiction and in that respect resembles the decision of *Cutler* v. *Rae,* 7 How., 729. That was a case of a libel *in personam* to enforce a general average contribution, and it was held that admiralty had no jurisdiction of such a case and that it belonged to the common law courts. Justice Wayne vigorously dissented.

In the subsequent case of *Dupont De Nemours* v. *Vance,* 19 How., 162, the court practically overruled the case of *Cutler* v. *Rae* when there was before it a case in which a libel suit had been filed for

non-delivery of a cargo, and the defense had been interposed that the cargo had been jettisoned. The court held there was a maritime lien.

In the statement of Justice Wayne in the appendix of 8 How., it was stated that *Cutler* v. *Rae* was not thoroughly considered; that the printed argument in favor of the jurisdiction was not before all of the court, and was not alluded to in conference; that the decision was made by a divided court, Catron, J., not giving an opinion because he was not satisfied either way; that the remaining eight judges were at first equally divided, and that it was finally disposed of rather from acquiescence in what was thought to be English authority against the jurisdiction than from any searching scrutiny of the practice and jurisdiction of courts of admiralty in general.

If the reason as to the limits of admiralty jurisdiction given in *People's Ferry Company* v. *Beers* is not now, and was not at the time it was given, sound and proper, then it does not support the decision and the case comes within the familiar rule that when a reason for a rule fails, the rule itself must fail.

II.

THE CONTRACT WAS NOT MARITIME BECAUSE IT WAS MADE ON LAND TO BE PERFORMED ON LAND.

The second reason given by Mr. Justice Catron for holding that contract to build a ship was not maritime is this:

> "So far from the contract being purely maritime, and touching rights and duties appertaining to navigation (on the ocean or elsewhere),

it was a contract made on land, to be performed on land.'' Citing *Chilton* v. *The Brig Hannah Bees,* Ad., 345, in support of the statement.

This reason was not, at the time it was given, a sound valid reason under the decisions of this court, and since then it has been entirely invalidated by the decision of *Dunham* v. *Insurance Company,* 11 Wall., 1.

In using this language the learned justice fell back upon the declaration of principles governing maritime contracts that was used in England, and which in that country was the main cause for depriving the admiralty courts there, of a jurisdiction over subjects which formerly had been in England, and still were proper subjects for admiralty jurisdiction in all other countries. We know that in England the admiralty courts were deprived of jurisdiction in every case in which it could be said that the contract was made on land, without reference to whether it was to be performed on the sea or not, and a contract which was to be performed on land, though made at sea, was not within the jurisdiction because of its place of performance.

In the case of *The Magnolia,* 20 How., 296, the dissenting opinion of Justice Daniel calls attention to the fact that in that case the contract, which was for the transportation of goods on the Alabama river, was made on land and that, therefore, the court ought not to assume jurisdiction in admiralty over it.

The distinction between maritime contracts made on land and such as are made at sea has been entirely abolished in admiralty in this country so far as determining whether they should be within the

jurisdiction of admiralty courts or not. The courts have taken broader ground, and with the exception of contracts for building a ship, all contracts that have to do with ships are considered maritime, and, therefore, properly within the jurisdiction of our admiralty courts.

Upon the point of locality with reference to making contracts Justice Bradley, in *Insurance Company* v. *Dunham*, 11 Wall., 1, says:

> "With respect to contracts, this criterion of locality was carried so far that, with the exception of the cases of seamen's wages and bottomry bonds, no contract was allowed to be prosecuted in the admiralty unless it was made upon the sea, and was to be executed upon the sea; and even then it must not be under seal.
>
> "Of course, under such a construction of the admiralty jurisdiction, a policy of insurance executed on land would be excluded from it. See 11 Wall., U. S., Book 20.
>
> "But this narrow view has not prevailed here. This court has frequently declared and decided that the admiralty and maritime jurisdiction of the United States is not limited either by the restraining statutes or the judicial prohibitions of England, but is to be interpreted by a more enlarged view of its essential nature and objects, and with reference to analogous jurisdictions in other countries constituting the maritime commercial world, as well as to that of England. * * *
>
> "In accordance with this more enlarged view of the subject, several results have been arrived at widely differing from the long established rules of the English courts."

We also refer to the language of Judge Story in the opinion of *De Lovio* v. *Boit*, 2 Gall., 398, Fed. Cas. No. 3776, decided in 1815, as follows:

> "The next inquiry is, what are properly to be deemed 'maritime contracts?' Happily in this particular there is little room for controversy. All civilians and jurists agree that in this appellation are included, among other things, charter parties, affreightments, marine hypothecations, *contracts for marine service in the building, repairing, supplying and navigating ships;* contracts between part owners of ships; contracts and *quasi* contracts respecting averages, contributions and jettisons; and, what is more material to our present purpose, policies of insurance. S. P. Johnson, J., in *Croudson* v. *Leonard*, 4 Cranch (8 U. S.), 434; Clierac, Le-Guidon, C. 1, p. 109; *Id.*, C. 3, p. 124; *Id.*, Jurisd. de la Marine, p. 191; 1 Valin Comm., 112, 20, etc.; 2 Emrt., 319; Godolph., 43; Zouch, 90, 92; Eaton, 69, etc., 295, etc.; Malyne, Lex Merc., 303; *Id.*, Collection of Sea Laws, X 2, p. 47; Consol. del Mare., C. 22; 2 Brown, Adm., C. 4, p. 71; 4 Bl. Comm., 67; *Stevens* v. *The Sandwich (supra);* Targa, Reflex, C. 1."

As Justice Bradley says in *Insurance Company* v. *Dunham*, p. 35, quoting Mr. Browne:

> "What is the *rationale*, and what the true principle which ought to govern this question, viz.: What contracts should be cognizable in admiralty: Is it not this? All contracts which relate purely to maritime affairs, the natural, short and easy method of enforcing which is found in the admiralty proceedings."

The criterion is not where the contract is made, or where it is to be performed, but rather whether it concerns ships and maritime affairs. And this should be the only criterion.

The reasons, therefore, given by Justice Catron, that a contract for building a ship, being a contract made on land, to be performed on land, and there-

fore not maritime, is no longer the law in any case, for the purposes of determining admiralty jurisdiction, and as to this reason, we say, as we have said in reference to the first reason given by the learned justice, that the reason of the rule having failed and being no longer valid, the rule itself should be changed.

III.

THERE CAN BE NO LIEN ACQUIRED BY A MATERIAL MAN WHEN THE OWNER IS PRESENT.

This is the third reason given by Mr. Justice Catron for holding that the contract to build a ship is not maritime.

This reason also is founded upon the limitations of the admiralty jurisdiction in England at the time of the adoption of the constitution. There, at that time, the contracts for building, repairing or victualling a ship were not maritime contracts. The contracts, therefore, were mere personal contracts of the owner over which the common law courts alone had jurisdiction. The learned justice, therefore, again resorted to the laws of England for the purpose of determining the limits of the admiralty jurisdiction here, and finding the contract there excluded, promptly excluded it here. The main reason for granting liens to those who furnish, supply and repair ships is that, as a member of this court has said: "to furnish arms and legs to the ship." The ship, by having good credit, could obtain the necessary supplies and repairs to enable her to prosecute her voyages. Without that credit she might be prevented from finishing the voyage begun because unable to obtain supplies and repairs at even an intermedi-

ate port, or a port of distress. It, therefore, has been the policy of all maritime nations to grant a lien to him who supplies necessaries to a ship. It is through the jealousy of the common law courts that such a lien was taken from and denied to the supply man in England. In this country it never has been the rule.

The distinction that there should not be a lien upon the ship for necessaries, if the owner was present at the time and place, when and where they were ordered and furnished, was a distinction that formerly was made, but has now been overruled and is no longer considered a valid reason for denying the lien. In determining whether there should or should not be a lien in a given case, the necessities of the ship are the only criterion, and not the presence, or credit of the owner. The reason for the lien is necessity, and this is also the policy of the nations, and we, therefore, find that this court, in its later decisions, abolished the distinction, and now grants a lien in any case of the ship's necessity, even when the owner is present.

The Grapeshot, 9 Wall., 129:

In that case supplies were furnished at Baltimore to a steamer owned in New York, and this court, after reviewing the authorities, announced five propositions of law, which practically hold that there shall be a lien in cases of contracts for repairs and supplies, whether express or implied, enforceable in admiralty, where proof is made of necessity for them, and in such a case a conclusive presumption will arise (in the absence of evidence to the contrary of the necessity for credit). The third proposition is stated as follows (141):

> "3. Necessity for repairs and supplies is provided where such circumstances of exigency are shown as would induce a prudent owner, if present, to order them, or to provide funds for the cost of them on the security of the ship."

The Guy, 9 Wall., 758:

In this case supplies were furnished at Baltimore to a steamer owned in New York upon the request of the agent of the owner. The District Court held that there was a maritime lien and this was affirmed by the Circuit Court and also by this court upon the authority of *The Grapeshot.*

The Lulu, 10 Wall., 192:

In this case the rule laid down in the case of *The Grapeshot* was followed, and Mr. Justice Clifford, on page 203, says:

> "Remarks are found in two cases decided by this court quite at variance with that rule, but it is unnecessary to comment upon those cases or to enter into any explanation of those remarks, as it is clear that if they assert any different rule of decision, they are in that respect directly overruled."

The court probably refers to the case of *Thomas* v. *Osborn,* 19 How., 22, in which it was held that a master could not bind the owners for repairs except by a contract of bottomry, and in this respect the court was following the laws of England.

In the case of *The General Custer,* 10 Wall., 204, Justice Clifford again says:

> "Objection is also made that the advances cannot be held to be a lien upon the steamer, because some of the repairs and supplies were

ordered by the owners in person, but the objection is entitled to no weight, as the evidence shows that it was expressly agreed that the advances should be furnished on the credit of the steamer. *(The Grapeshot (supra); The Guy (ante,* 710); S. C., 1 Ben., 112; *The Lulu (supra).*"

The Patapsco, 13 Wall., 329:

This was a case of coal furnished at Baltimore to the steamer Patapsco, owned in New York. It appeared that the owner's agent at Baltimore ordered all of the coal, and that it was charged to the Commercial Steamboat Company, the steamer's owner, and, therefore, it was contended that there could be no maritime lien. The court, however, affirmed the decisions of the District and Circuit Courts and held that there was a maritime lien under these circumstances.

Under these authorities we believe we are justified in saying that whether the owner was present or not at the time that necessary supplies and repairs were furnished, is unimportant in determining whether there should be a lien or not, and if that is so, then it is much more unimportant whether he was present or not, for the purpose of determining whether the given contract is maritime or not. The presence of the owner, therefore, has nothing to do with the case. It certainly cannot be said in the light of these decisions that even in the case of the written contract for the building of a ship, while the latter remains in the possession of the shipbuilder, he was building it on the personal credit of the owner or person who ordered it. His right of possession, and the lien which it gave him, aside

from any statutory lien that he may have under the laws of a particular state, was the best security, and the same kind of security that the supply man had who furnished necessaries to a ship during the voyage.

The distinction, therefore, made by Justice Catron has been entirely abandoned as a criterion, and the reason he gave is therefore no longer valid, and the rule which it is supposed to uphold, therefore, has no longer any support, and is therefore without reason. Neither can it be said, using the language of the learned justice, "that secret liens are to be discouraged." All maritime liens are in their very nature more or less secret; they must be, for there is no provision in the maritime law or the federal statutes for publishing or recording them. This is now known to all persons who deal with ships, and, while now and then there may be a case of hardship due to the secret character of the lien, this is more than offset by the superior advantages to the ship owner and to commerce. They are easily provided against in case of sale by security and bonds.

This secrecy is no longer a reason for denying the maritime character of a contract. It never ought to have been if it was; it certainly has no force now.

THE CONTRACT SHOULD BE HELD TO BE MARITIME.

Until the contract for building a ship is held to be maritime, there remains a flaw in our system of admiralty jurisdiction. It cannot be a perfect and harmonious whole until this ban is removed. The present system is incomplete.

This contract is needed to round out and perfect

our system of admiralty jurisprudence, and bring it back to where it once was in England, and into harmony with the admiralty jurisprudence of the other maritime countries of the world.

The owners for whom ships are now being built can only be benefited by having a national law take the place of the different dissimilar watercraft laws now found on the statute books of the states bordering upon navigable water.

The shipwright can only be benefited by having the contract for the creation of the ship raised to the dignity of a maritime contract "alongside" of the contract for repairing, rebuilding and altering the ship while on the ways on land, or in the dry dock. The latter are held to be maritime now, although at one time they were excluded.

Judge Lowell (in 2 Lowell, 477, 1876) says:

> "The notion that the maritime character of a contract depends on the *situation* of the vessel reached its climax when it was held that a laborer who scrapes the bottom while in the dry dock has no lien.
>
> "These decisions were made during a time after Judge Story's death, when the Supreme Court seemed bent on narrowing the jurisdiction in all possible directions, by decisions, some of which have now been overruled, and others explained to mean much less than they appeared to intend."

The Robert Parsons, 191 U. S. 17:

In this case it was held that repairing a canal boat in a dry dock in the home port was a maritime contract.

Step by step this court has brought back to the

Admiralty Court the jurisdiction which admiralty courts formerly had in England, and which they always had in all of the maritime codes which we have quoted from or referred to in this argument, the latest of these steps being the recognition as a maritime tort of a claim for damage done to an object fastened to or imbedded in the land.

The Blackheath, 195 U. S., 361:

This case practically rounds out into a harmonious whole the jurisdiction of our admiralty courts in matters of tort, and brings us almost if not quite within the Act of Parliament of England which provides that admiralty has jurisdiction of all damages done by any ship. And this is as it should be. It does away with the arbitrary distinction which makes it possible, as was the case in the case of *The Maud Webster,* 9 Ben., 547, Fed. Cas. 9302, of holding that the damage to the schooner which struck a derrick was a subject of admiralty jurisdiction and could be so tried, while the damage to the derrick in the same collision was not a maritime tort and could not therefore be inquired into by the Admiralty Court.

We can close this part of our argument with no better words than are used by Mr. Justice McLean in the case of *The Magnolia,* 20 How., 296-307:

> "Antiquity has its charms, as it is rarely found in the common walks of professional life; but it may be doubted whether wisdom is not more frequently found in experience and the gradual progress of human affairs; and this is especially the case in all systems of jurisprudence which are matured by the progress of human knowledge. Whether it be common, chan-

> cery, or admiralty law, we should be more instructed by studying its present adaptations to human concerns, than to trace it back to its beginnings. Everyone is more interested and delighted to look upon the majestic and flowing river, than by following its current upwards until it becomes lost in its mountain rivulets."

We are asking the court now to overrule the case of *People's Ferry Co.* v. *Beers,* decided in 1858,

First. Because it was decided erroneously.

Second. Because the court has since overruled many cases which were then considered binding authority in that case.

Third. Because the reasons given in that case for the decision are no longer valid.

Fourth. Because the contract for building a ship is a maritime contract everywhere else in the world.

Fifth. Because it is right and proper that it be restored to the jurisdiction of the Admiralty Courts.

Sixth. Because the case is merely a rule of jurisdiction and not of property or human conduct.

The Rule of Stare Decisis.

The only reason that can be urged against overruling the case of *People's Ferry Co.* v. *Beers* is: the rule of *stare decisis.*

We are fully aware of the importance of this rule, and also that no court of final resort should lightly consider this important rule, or be quick to change its long established and settled rules of law.

This is all true, speaking generally, but the rule of *stare decisis* gains most of its importance in being a rule of property and human conduct. In fact, these

are the only justifications for its application when conditions have changed which make it expedient or desirable that a given rule should be changed, qualified or abrogated.

Ship owners are entitled to the good offices of the Admiralty court to settle their differences with shipbuilders. This court is a court better qualified to hear and determine them than a common law court. In every case of that kind it requires technical knowledge of the subject. This is usually possessed by judges in courts of admiralty, and in any case this knowledge is much more readily acquired, than by a jury of even average intelligence and information.

As to the rule of *stare decisis,* we desire to refer to the language of Chief Justice Taney in the case of *The Genessee Chief,* 12 How., 443, at page 456, in which he speaks of the case of *The Thomas Jefferson:*

> "It is the decision in the case of *The Thomas Jefferson* which mainly embarrasses the court in the present inquiry. But at the same time we are convinced that, if we follow it, we follow an erroneous decision into which the court fell, when the great importance of the question as it now presents itself could not be foreseen, and the subject did not therefore receive that deliberate consideration which at this time would have been given to it by the eminent men who presided here when that case was decided. For the decision was made in 1825, when the commerce on the rivers of the west and on the lakes was in its infancy, and of little importance, and but little regarded compared with that of the present day" (page 458):
>
> "The case of *The Thomas Jefferson* did not decide any question of property, or lay down any rule by which the right of property should be determined. If it had, we should have felt our-

selves bound to follow it, notwithstanding the opinion we have expressed. For everyone would suppose that after the decision of this court, in a matter of that kind, he might safely enter into contracts, upon the faith that rights, thus acquired, would not be disturbed. In such a case *stare decisis* is the safe and established rule of judicial policy, and should always be adhered to. For if the law, as pronounced by the court, ought not to stand, it is in the power of legislature to amend it, without impairing rights acquired under it. But the decision referred to has no relation to rights of property. It was a question of jurisdiction only, and the judgment we now give can disturb no rights of property, nor interfere with any contracts heretofore made. The rights of property and of parties will be the same by whatever court the law is administered. And as we are convinced that the former decision was founded in error, and that the error, if not corrected, must product serious public as well as private inconvenience and loss, it becomes our duty not to perpetuate it."

We have shown what the law of England now is, and that it embraces contracts of building a ship among those within the jurisdiction of the admiralty, and we will now take up its Vice Admiralty Courts and we find in them and the Consular Courts full and complete jurisdiction in admiralty of the building contract.

BRITISH COLONIAL (Vice-Admiralty Courts).

The British Vice-Admiralty Courts have jurisdiction over "all claims in respect of the *building*, equipping or repairing" of vessels.

See Vice-Admiralty Courts Act (1863), c. 24, Schedule A. and S., 10. To show how wide a field

this jurisdiction obtains in, a list of these Vice-Admiralty Courts follows:

Antiqua — Jurisdiction given by Vice-Admr. Courts Act (1863), c. 24, Sched. A. & S., 10.

Bahames—Same.
Barbados—Same.
British Columbia—Same.
British Honduras—Same.
Cape of Good Hope—Same.
Ceylon—Same.
Dominica—Same.
Falkland Ids.—Same.
Gambia River—Same.
Gibraltar—Same.
Grenada—Same.
Hong Kong—Same.
Jamaica—Same.
Labuan—Same.
Malta—Same.
Montserrat—Same.
Natal—Same.
Nevis—Same.
N. Brunswick—Same.
Newfoundland—Same.
N. S. Wales—Same.
N. Zealand—Same.
Nova Scotia—Same.
Prince Edward Island—Same.
Queensland—Same.
St. Christopher—Same.
St. Helena—Same.
St. Lucia—Same.
St. Vincent—Same.
Sierra Leone—Same.

South Australia—Same.

Tasmania—Same.

Tobago—Same.

Trinidad—Same.

Van Couver's Island—Same.

Victoria (colony)—Same.

Virgin Islands—Same.

West Australia—Same.

Bermuda — Jurisdiction given by Vice-Admr. Courts Act C. 24 (1863); and also by Bermuda Act No. 8 of 1862, S. 1.

Guiana (British) — Jurisdiction given by Vice-Admr. Act C. 24 (1863); also by Order No. 4 of 1860; also by Letters Patent of May, 1860.

Fiji (colony) — Jurisdiction given by Order in Council of 26 Oct., 1875.

Gold Coast—Jurisdiction given by Vice-Admr. Courts Act C. 24 (1863); also by Order in Council of July 31, 1880.

Lagos—Jurisdiction given by Vice-Admr. Courts Act C. 24 (1863); also by Order in Council of July 31, 1880.

Quebec—Jurisdiction given by Vice-Admr. Courts Act C. 24 (1863); also by Consolidated Statutes, pp. 662-667.

Maritius — Jurisdiction given by Vice-Admr. Courts Act C. 24 (1863); also by Order in Council of 23 Oct., 1851.

Straits Settlement—Jurisdiction given by Vice-Admr. Courts Act (1863) C. 24; Vice-Admr. Courts Act (1867) C. 45:

West Pacific Islands—See "Fiji Gazette," March 7, 1884 (official order).

Ontario — Jurisdiction given by "Jurisdiction

Acts" (1877) C. 21; "Jurisdiction Acts" (1879) C. 40; "Jurisdiction Acts" (1882) C. 34.

Consular Courts (British).

The British Consular Courts were given admiralty jurisdiction as indicated below—and this admiralty jurisdiction includes "claims in respect of the *building*, equipping or repairing" of vessels.

H. M. Supreme Court for China, Japan and Korea—Jurisdiction given by (1) Rules of procedure in admiralty in the Supreme Court, of June 5, 1867, approved by Her Majesty's Minister of Foreign Affairs in Dispatch No. 8 of Sept. 9, 1867; (2) by 26 & 27 Vict. C. 24; (3) China and Japan Order in Council of March 9, 1865, Act 54; (4) see also 14 Hertslets' Treaties, p. 246.

Contantinople (Ottoman Dominion)—By Order in Council of Dec. 12, 1873, No. 88.

Egypt—Same.

The Levant—See 7 L. T. N. S., 164.

We will now take up in alphabetical order the codes of nearly all the maritime nations (at least those we have had access to) and we find without exception the contract to build is held to be a maritime contract.

Austria.

Austria has a Tribunal of Commerce, corresponding to the English Admiralty Courts, distinct from the ordinary Civil Tribunals. And while Austria has no written maritime law, it recognizes the maritime usages and laws of the Consolat de la Mer (which see), Chapter 32.

See Pardessus' Collection Lois Maritimes (Aus-

tria), and now uses the second book of the Italienne Code of Commerce (1883).

Matternich Lois d'Autriche, 102.

(See under the head of Italy.)

Belgium.

Belgium gives admiralty jurisdiction over contracts to *build* a ship.

See New Mar. Code (1880), Art. 4 (10-11); Journal de Droit Inter. Prive. (1878), p. 511.

The Belgium maritime law is based on the laws of the Hansa Towns (*Hanseatic Ordinances*), which expressly make *contracts* to *build* maritime, Arts. 1, 2, 3, 4, 5.

Brazil.

Brazil gives jurisdiction to admiralty in all suits involving *contracts* to *build* a vessel.

See Codigo Commercial do Imperio do Bresil (1850), Part II; also Decrees Nos. 737-738 of 1850; also Decree No. 1597 of 1855.

Denmark.

In Denmark the admiralty has, from the earliest times, had jurisdiction over contracts to *build*. Their maritime law is based on the laws of (1) Wisbuy; (2) Hanseatic Ordinances; (3) the 4th Book of Christian V. (April 15, 1683).

See (1) Pardessus Collection des Lois Maritimes, Vol. III, p. 265; (2) Horesteren, Advokat Klubein, Copenhagen (translated by Dr. Wendt, London).

The new maritime code of Denmark (1892) adopts these old laws almost *in toto* (in concert with

Sweden and Norway), giving admiralty jurisdiction over "the *building,* repairing, purchase and sale of ships."

See English translation of the maritime code of Denmark by Schmidt in Parliamentary Paper, Foreign Office, Miscellaneous Series (1892), No. 240.

France.

The French admiralty jurisdiction extends to "the *building,* fitting, providing, manning and sale of ships." The maritime law of France is based on (1) the laws of Oleron (Roll d'Oleron); (2) Il consolato del Mare (Chap. 32); (3) Marine Ordinance of 1691 (Valin), Tit. 2, Art. 1.

See Pardessus' Collection des Lois Maritime; Bean's Code Maritime, introduction, p. 81, *et passim.*

The modern Code of Commerce expressly gives admiralty jurisdiction over contracts to *build.*

See Code of Commerce, Art. 191; Code of Commerce, Art. 633.

In 1833 one M. Warkong discovered a manuscript in the library at Bruges, containing the ancient maritime law of Damme, the acknowledged source of the maritime law of Holland, North Germany, Sweden and Denmark, which proves the French origin of these laws, thereby substantiating the contention of Pardessus in his great work.

Germany.

There are no specific courts of admiralty in Germany, except Marine Courts along the coast to inquire into maritime *casualties.* All other admiralty matters are subject to the jurisdiction of ordinary civil courts.

Pardessus speaks of ancient admiralty jurisdiction in the North German States, in accordance with the laws of *Wisbuy* (based on Oleron) and the laws of the Hansa *Towns.*

Greece.

The French Code of Commerce was adopted by Greece in 1835.

See Raikes' translation of Greek Code.

Holland.

At the present day there are no distinct Admiralty Courts in Holland, nor is there any special jurisdiction in cases of maritime law.

> Vanderlinden's Manual of Law and Practice of Holland, p. 249 (Juta's translation).

But Pardessus gives Holland a specific admiralty law prior to 1700, based on the laws of the Hansa Towns, and (2) Mar. Cont., Holland Code, Art. 313.

See Pardessus (subject of Holland).

Italy.

The maritime law of Italy is based on *Il Consolata del Mare,* which gives admiralty jurisdiction over contracts to *build* (Chap. 32).

See *Codice per la Marina Mercantile,* 1877 (Revised 1883).

And the modern maritime law of Italy expressly gives admiralty such jurisdiction.

See Code of Commerce, Book IV, Title 1, Chap. 1, Art. 869; Code of Commerce, Book IV, Title 1, Chap. 2, Art. 879.

And this jurisdiction is reiterated by royal decree, giving to the admiralty jurisdiction of "all contracts for *building,* acquiring or hiring a ship or *part* of a ship."

See Legge Transitoria Commerciale (Provisional Dispositions enacted by Royal Decree of Dec. 14, 1882, for the execution of the Commercial Code), Art. 13.

And again, by another order giving admiralty jurisdiction of "declarations and contracts for *building,* acquiring or hiring of ships."

See Order (Regolamento) for carrying out the Code of Commerce, Title 5, Art. 68; also "Specifications (dichiaraziono) and contracts for the *building,* ownership or leasing of vessels."

See order for carrying out the Code of Commerce, Title 5, Art. 70.

MEXICO.

Here the contract is also held to be maritime.

NORWAY.

The maritime law of Norway is based on the laws of the Hansa Towns, and there is an express jurisdiction in the admiralty over "contracts for *construction* of ships" and over "lawsuits respecting the building and manning of ships."

See (1) Laws of Navigation of 1860, Chap. 1; (2) Norwegian Maritime Code (adopted 1894, copying the exact code of Sweden), Chap. 1, Art. 3.

PORTUGAL.

The maritime law of Portugal is modeled on the French system, and gives admiralty jurisdiction as

to "contracts, in writing, for the *construction* of ships."

See Portuguese Commercial Code, Art. 1300.

"Contracts to *build* ships" are "maritime contracts."

Code of Commerce (1889), Book III (Maritime Trade), Title 1, Chap. 1, Art. 578 (par. 12).

Same

Code of Commerce, Book III, Title 1, Chap. 1, Art. 587.

Code of Commerce, Book III, Title 1, Chap. 1, Art. 590.

RUSSIA.

In Russia, admiralty jurisdiction extends to "*contracts relating to* the *construction,* purchase, refitting and freighting of ships."

See (1) Russia Code (Marine), Art. 1-3; (2) International Commercial Law, by Leone Levi, Vol. 1, p. 9.

SPAIN.

The Spanish Code of Civil Procedure, 1881, assigns a portion of the maritime jurisdiction especially to the judges of the first instance (juzgoch de primera instansia). This extends to "*materials* supplied for *building.*"

Code of Commerce, Art. 580, Par. 8.

Code of Civil Procedure, Art. 992; also Art. 1544 (Spanish Maritime Law, founded on *Consolat de la Mer*).

SWEDEN.

Swedish maritime law is founded on the laws of Wisbuy, and the maritime jurisdiction extends to "the *building* or commanding of a vessel."

See Marine Law of Feb. 23, 1864, Sec. 302. The present (new) code gives the same jurisdiction. (Sweden, Denmark and Norway all adopting the same code in 1891, 1892, 1894 respectively.)

See Swedish Maritime Code, Chap. 1, Art. 3.

English translation by Inglis in Parliamentary Papers, Foreign Office (1892), Miscellaneous Series, No. 240.

TUNIS.

Tunis has adopted the French maritime code *in toto*.

Raikes Admr. Ins.

All of the principal maritime nations of the world say the contract is maritime, and every step in the direction of unification of the laws of all countries is a step in the direction of progress in civilization.

The Maritime Law Association of the United States has been for years interested with similar associations of the principal maritime nations in bringing about as near as may be the unification of laws to govern ships and maritime affairs. Ships are rovers and are as much in foreign ports as in those of their flag. Uniformity in laws, therefore, is extremely convenient and desirable.

Conclusion.

The contract being maritime, it follows that the Admiralty Courts had jurisdiction to enforce any proper lien which the complainants had, and therefore the State Courts had no jurisdiction. For the foregoing reasons, therefore, the decision of the Supreme Court of Michigan should be reversed.

Respectfully submitted.

Charles E. Kremer,
Wm. T. Gray,
Attorneys for Plaintiffs in Error.

Chicago, October, 1906.

Office Supreme Court, U. S.
FILED.
JAN 21 1907
JAMES H. McKENNEY,
CLERK.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1906.

No. 219.

IROQUOIS TRANSPORTATION COMPANY, claimant of the Steamer Winnebago, etc.,
Plaintiff in Error,

vs.

GEORGE W. EDWARDS, etc., copartners as H. D. Edwards & Company,
Defendant in Error.

Error to the Supreme Court of Michigan.

BRIEF FOR PLAINTIFF IN ERROR.

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IN THE

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Defendant in Error.

Error to the Supreme Court of Michigan.

BRIEF FOR PLAINTIFF IN ERROR.

This is a proceeding by the firm of H. D. Edwards & Co., of Detroit, Michigan, against the Steamer Winnebago, of Michigan City, Indiana, brought under Sec. 10,789, Compiled Laws of Michigan, 1897.

The Winnebago is a steel steamer of 1091 tons burthen and was built by the Columbia Iron Works at St. Clair, Michigan, for the Iroquois Transportation Company, a corporation organized under the laws of the State of Indiana. The contract for the construction of this steamer was made on March 8, 1902, between the Columbia Iron Works and John

J. Boland and Thomas J. Prindiville, and by the latter assigned to the Iroquois Transportation Company April 5, 1902.

The construction of the vessel was begun in 1902, and the cash payments under the contract were as follows:

$7,500 at the date of signing the contract.
$7,500 April 3, 1902.
$4,000 April 15, 1902.
$4,000 June 15, 1902.
$4,000 Aug. 15, 1902.

And in addition to this, changing the terms of the contract, there was an additional $4,000 paid in October, 1902, and two negotiable notes of $4,000 each given, maturing respectively Nov. 1, 1903, and Nov. 1, 1904.

The steamer was launched March 21, 1903, but was not completed for delivery until July 19, 1903, at which time the Iroquois Transportation Company received a bill of sale of the steamer and delivered to the Columbia Iron Works 96 negotiable bonds of $500 each, secured by a mortgage on the steamer, and paid the balance of the cash payment, which was to be made on the completion of the vessel, and which then amounted to between $400 and $500, and in that way paid in full the purchase price of the steamer.

The contract is found on record page 143.

On the 18th of July, 1903, the steamer was inspected, measured and enrolled under the laws of the United States, and also licensed to be employed in domestic and foreign trade for one year from the date of enrollment. (Record, pages 140, 142.)

She left on the 19th of July for Lorain, Ohio,

where she took on board a cargo of railroad iron. At the time of her departure from St. Clair she had not been entirely completed and some of the workmen remained on board of her and returned with her to St. Clair; where she remanied for a day or two and where additional work was done upon her, and after that she was engaged in carrying cargoes between different points on Lake Erie and points on Lake Superior, having brought one cargo from Marquette, Michigan, and another from Lake Linden to ports on Lake Erie.

On the 30th day of July, or within eleven days after the steamer was delivered, the Columbia Iron Works made a common law assignment for the benefit of its creditors.

On the 25th day of August, the firm of H. D. Edwards & Company served a notice on the Iroquois Transportation Company that it made a claim of lien against the steamer for material furnished, and in October following the present complaint was filed as an intervening complaint in the case of De Laney Forge and Iron Company against the Steamer Winnebago then pending in the Circuit Court of Wayne County and process issued, the steamer attached and a bond given for her release by the Iroquois Transportation Company. In both cases the Iroquois Transportation Company appeared, filed a bond for the release of the steamer and subsequently filed its answer in both cases.

A hearing was had before Judge Donovan without a jury, in the Circuit Court of Wayne County in May, 1904, and at this hearing the court found the issues for the plaintiff in both cases, entering judgment in the case of the Delaney Forge & Iron Com-

pany for $1,999.90, with interest from Aug. 1, 1903. In the case of George W. Edwards, *et al.*, for the sum of $1,599.64, with interest from June 30, 1903.

From these judgments the Iroquois Transportation Company took an appeal to the Supreme Court of Michigan and there these decrees were affirmed, whereupon error was assigned and the cases removed to this court.

BRIEF.

I.

That the Steamer Winnebago was, at the time of her seizure, not used or intended to be used in navigating the waters and canals of this state.

Sauter v. *The Sea Witch,* 1st Cal., 162.
Tucker v. *Sacramento,* 1st Cal., 403.
Ray v. *Henry Harbeck,* 1st Cal., 451.
Haytien Republic, 65 Fed. Rep., 120.

II.

A proceeding under the statutes of Michigan against a vessel which has already been enrolled and licensed under the laws of the United States, and at the time of the seizure was actually engaged in interstate commerce, is unconstitutional and void because in conflict with the constitution and laws of the United States.

The Glide, 167 U. S., 606.
Johnson v. *Elevator Company,* 119 U. S., 397.

White's Bank v. *Smith*, 7 Wall., 646.
The Menominee, 36 Fed. Rep., 197.
Perry v. *Haynes*, 191 U. S., 17.
The Edith, Fed. Case 4283, 11 Blatch., 451.
The Edith, 94 U. S., 519.
Moir v. *The Dubuque*, Fed. Case 9696.
The Roanoke, 189 U. S., 185.

III.

The material and supplies were not furnished on the credit of the vessel, but were contracted for, furnished and delivered to and on the credit of the Columbia Iron Works.

The Templar, 59 Fed. Rep., 203.
The Ferry Co. v. *Beers*, 20 How., 393.
The Underwriter, 109 Fed. Rep., 754.
Stephenson v. *Francis*, 31 Fed. Rep., 720.
The Westover, 76 Fed. Rep., 384.
The Abby Whitman, Fed. Case 15.
Drew v. *Hull of a New Ship*, Fed. Case 4078.
Van Pelt v. *Ohio*, Fed. Case 16870.
The Calisto, Fed. Case 2316.
Sewell v. *Hull of a New Ship*, Fed. Case 12682.
Van Cleve Glass Co. v. *Erratt*, 110 Mich., 689.

IV.

The complainants have no lien enforcible under this act for any contracts made or material furnished after the vessel was launched on March 21, 1903.

Globe Iron Wks. v. *Steamer*, 100 Mich., 583.
Lake v. *Manhattan*, 46 Fed. Rep., 797.

Perry v. *Haynes*, 191 U. S., 7.
Tucker v. *Alexandroff*, 183 U. S., 424.

V.

That the steamer Winnebago, engaged in interstate commerce, was not subject to seizure while passing from port to port through the waters within the jurisdiction of the courts of the State of Michigan.

Mich. C. R. Co. v. *Chicago M. L. S. Co.*, 1 Ill. App., 339.
Wall v. *Norfolk W. R. Co.*, 52 W. V., 485; 64 L. R. A., 501.
Connery v. *Quincy O. & K. C. R. Co.*, 99 N. W., 365; 64 L. R. A., 624.

VI.

The contract to build a ship is a maritime contract and therefore there is a lien for material and labor furnished which can be enforced in a court of admiralty, there being a lien under the state law.

People's Ferry Co. v. *Beers*, 20 How., 383.
Roach v. *Chapman*, 22 How., 129.
J. E. Rumbell, 148 U. S., 1.
Davis v. *New Brig*, Fed. Cas., 3643.
Read v. *Hull of a New Brig*, Fed. Cas., 11,609.
The Calisto, Fed. Cas., 2316.
The Hull of a New Ship, Fed. Cas., 6859.
Van Pelt v. *The Ohio*, Fed. Cas., 16,870.
The Abbie Whitman, Fed. Cas., 15.
Sewall v. *The Hull of a New Ship*, Fed. Cas., 12,682.
Purington v. *The Hull of a New Ship*, Fed. Cas., 11,478.

The Richard Busteed, Fed. Cas., 11,764.

Drew v. *The Hull of a New Ship,* Fed. Cas., 4078.

The Chas. Mears, Fed. Cas., 10,766.

N. J. Steam Nav. Co. v. *Merchants' Bank,* 6 How., 378.

Benedict's Admiralty (2 Ed.), Sec. 264.

De Lovio v. *Boit,* 2 Gall., 475.

Insurance Co. v. *Dunham,* 78 U. S. (11 Wall.), 10.

Parsons on Shipping and Admiralty, Vol. 2, p. 327.

Dupont De Nemours v. *Vance,* 19 How., 162.

The Grape Shot, 9 Wall., 129.

The Guy, 9 Wall., 758.

The Lulu, 10 Wall., 192.

The General Custer, 10 Wall., 204.

The Patapsco, 13 Wall., 329.

The Robert Parsons, 191 U. S., 17.

The Blackheath, 195 U. S., 361.

The Magnolia, 20 How., 296-307.

Tucker v. *Alexandroff,* 183 U. S., 424.

Globe Iron Wks. v. *Steamer,* 100 Mich., 583.

The Eliza Ladd, Fed Cas., 4364.

BRIEF AND ARGUMENT.

This is a proceeding instituted in the Circuit Court of Wayne County, Michigan, by an intervening complaint in the case brought by the Delaney Forge and Iron Company against the Steamer Winnebago *in rem*, under the Water Craft Act of Michigan.

The act under which this proceeding is brought is found in 3 Compiled Laws of Michigan, page 3254, and is as follows:

> "(10789) Sec. 2. Every water craft of above five tons burthen, used or intended to be used, in navigating the waters of this state, shall be subject to a lien thereon:
>
> "First, for all debts contracted by the owner or part owner, master, clerk, agent or steward of such craft, on account of supplies and provisions furnished for the use of said water craft, on account of work done or services rendered, on board of such craft, by seamen, or any employe, other than the master thereof; on account of work done or services rendered, by any person, in or about the loading or unloading of said water craft; on account of work done or materials furnished, by mechanics, tradesmen, or others, in or about the building, repairing, fitting, furnishing or equipping such craft: Provided, that when labor shall be performed or materials furnished as aforesaid, by a sub-contractor, or workman, other than an original contractor, and the same is not paid for, said person or persons may give the owner or his agent, or the master or clerk of said craft, timely notice of his or their said claim, and from thenceforth said person or persons, shall have a lien upon said craft, *pro rata,* for his or their said claims, to the amount that may be due by said owner, to said original contractor, for work or labor then done on said water craft."

This case being an intervening petition in the case of Delaney Forge & Iron Co. against the Steamer Winnebago, was tried in the Supreme Court of Michigan with the original case upon one record and one brief. The record in this court is printed with the record in No. 218, October term, 1906, and the errors assigned are identical except Point 2, which does not apply to this case.

The argument upon the errors assigned in this case are identical with the arguments in No. 218 and we, therefore, refer to these in supporting the points made in this case upon the assigned errors.

For the reasons given the decision of the Supreme Court of Michigan should be reversed.

CHARLES E. KREMER,
WM. T. GRAY,
Attorneys for Plaintiff in Error.

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1906.

No. 218.

Office Supreme Court
FILED
FEB 25 19
JAMES H. McKEN

IROQUOIS TRANSPORTATION COMPANY,
Claimant of the Steamer Winnebago, Etc.,
Plaintiff in Error,

vs.

DE LANEY FORGE & IRON COMPANY,
Defendant in Error.

BRIEF FOR DEFENDANT IN ERROR.

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Supreme Court of the United States

OCTOBER TERM, A. D. 1906.

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DE LANEY FORGE & IRON COMPANY,
Defendant in Error.

BRIEF FOR DEFENDANT IN ERROR.

ADDITIONAL STATEMENT OF FACTS.

A fact which appears inferentially, though not directly, in statement of facts in brief for plaintiff in error, should perhaps affirmatively appear, to wit: that the claims for which liens have been enforced are for materials furnished in connection with the *original construction*—the *building* of the ship *Winnebago.*

A statement which might be misunderstood, if not here referred to, is the statement in plaintiff in error's statement of facts (p. 2), that the steamer was "completed for delivery" July 19th, 1903. As a matter of fact, the steamer was delivered on that date, but she was delivered in an uncompleted condition, and was so turned over to the Iroquois Transportation Company, for whom she was

being built, in such uncompleted condition, only eleven days before the builder, the Columbia Iron Works, made a common law assignment for the benefit of its creditors.

A further fact should perhaps appear that the *Winnebago* was never seized or attached in these proceedings, but that instead a bond was given without seizure.

A further fact may also be stated that subsequent to the decree of the Supreme Court of Michigan application for a writ of error was made to the Supreme Court of Michigan, and refused, and that it was thereafter that an application was made to this court by plaintiff in error.

The several propositions contended for in the brief for plaintiff in error will be answered in the order in which they are treated in that brief.

Of Point I.

The first point deals with the question of whether or not the *Winnebago* was at the time of her construction used or intended to be used in navigating the waters of the State of Michigan within the meaning of the Watercraft Act, which provides (Section 10789 of the Compiled Laws of Michigan, 1897, Section 2), as follows:

> "Every water craft of above five tons burthen, used, or intended to be used, in navigating the waters of this state, shall be subject to a lien, etc."

The question is, whether or not the Legislature of Michigan intended by the act to confine it to vessels navigating exclusively within the waters of such state.

The Supreme Court of Michigan has determined what the intention of the Legislature of the State of Michigan was in this regard, as appears in the case of the *Brig "City of Erie" vs. Canfield*, et al., 27 Michigan, 479.

In the case at bar the Supreme Court of the State of Michigan has also passed upon this particular question (R., 144).

It is in no sense a Federal question, and is therefore not before this court.

Ashley vs. Ryan, 153 *U. S.*, 436.

It would therefore not seem profitable in this connection to consider the California and Oregon cases in the brief for plaintiff in error, which authorities are of course dealing only with their local statutes. These cases were fully discussed in the case at bar in the brief filed with the Supreme Court of the State of Michigan.

As was stated by Circuit Judge Severens in the Circuit Court of Appeals for the Sixth Circuit, in a case dealing with this same vessel and this same general state of facts, reported in 141 Federal, 945, at page 949; 73 C. C. A., 295, at page 299:

> "The construction of the provision of the statute in this regard was presented to the Supreme Court of the state in The City of Erie vs. Canfield, 27 Mich., 479, and was decided adversely to the contention which counsel for plaintiff in error now makes; the court holding that the vessel need not be one intended to be exclusively used on the waters of that state. Apparently this settles the question for us, if, as we think, it could make no difference in determining the maritime nature of the transaction, whether the ship was intended to be used wholly in Michigan waters, or elsewhere as well."

Of Point II.

The plaintiff in error next sets up the point that the complainant cannot recover in this case, because at the time it received notice of the complainant's claim, and at the time of the seizure of the steamer *Winnebago* in this suit, it was a bona fide purchaser without notice of complainant's lien, and that complainant did not within a

year file in the proper court in the county in which it resides, its claim for a lien.

As preliminary the *Winnebago* was never seized in these proceedings.

While the point here raised by plaintiff in error is not before this court, Ashley vs. Ryan, 153 U. S., 436, Dower vs. Richards, 151 U. S., 658, the elaborate discussion of facts under this point in the brief for plaintiff in error affecting as it may other issues, is our excuse for a full answer.

No such defense was set up in the pleadings in the cause, and it was not until after appeal had been taken to the Supreme Court of the state of Michigan that a motion was made "to amend answer, etc." This motion to amend was submitted, briefs filed, and the motion denied by the Supreme Court of the State of Michigan on October 8th, 1904. It was submitted to the Supreme Court of the State of Michigan that if there were any merit in the defense which plaintiff in error then proposed to have added to the answers, the consideration of it would allow plaintiff in error to profit by its wrongful delay. In other words, if the additional defense then offered had been timely set up, defendant in error would have had ample opportunity to overcome it had it desired to do so. It was not until after the year prescribed by Section 10832, under which plaintiff in error then came forward and asked new rights, had expired, that the motion to amend and add a new defense was made, and if there had been any force to the new defense offered, defendant in error could not overcome it, where, had it been timely set up, defendant in error could have brought itself within the statute, had it so desired. Defendant in error's claim accrued in July, 1903 (R., 3, 4). Under Section 10832, defendant in error had until July, 1904, to file its claim in the county of its residence. If defendant in error had had any notice that plaintiff in error in-

tended to raise the new defense, that defense offered could, up to July, 1904, have been easily brushed aside, if it, in fact, existed. On August 15th, just after the year had expired, and when, if the defense proposed really had any force or merit, it would be too late to overcome it, it was brought forward by plaintiff in error. It is plain that if there were no other reasons for not considering the new defense, the fact that, if it has any force, it would tend to thwart, rather than further, justice, would be sufficient reason for not considering it.

The new defense which was brought forward as against the original complaint is urged under Section 10832, Compiled Laws of 1897, which reads:

> "Liens may be enforced under this Act at any time within six years from their origin: Provided that no lien shall be enforced against a watercraft in the hands of a bona fide purchaser, without notice, unless a complaint to enforce the same shall have been filed in the proper court in the county where the party claiming the lien resides, within one year from the time when the same accrued."

The Supreme Court of the State of Michigan was plainly right in denying the petition of plaintiff in error for leave to amend and add the new defense. But if the defense had been timely set up, it would not avail, because:

The Iroquois Transportation Company was not a bona fide purchaser;

The intent of the act was to give the benefit of it to non-residents as well as residents;

The purpose of the section was to have timely notice given and to have the claims timely enforced.

The whole intent of the statute, as is shown by Section 10831, is to provide for the enforcement of the

claims of non-residents as well as those of residents. Section 10831 provides:

> "In cases where, by the general maritime law or laws of any other of the United States, now or hereafter to be passed, liens similar to those provided for in this Act shall be created against water-craft, the same may be enforced under the proceedings established by this Act, in like manner as if they accrued in this State," etc.

In this case, even assuming that the Iroquois Transportation Company is a bona fide purchaser, timely notice was given, and the enforcement of the claim timely proceeded with, because notice was given, in fact, on August 25th, 1903, about a month after the completion of the *Winnebago,* and suit was instituted by the filing of complaint on October 6th, 1903.

The purpose of the limitation was to fix the time limit when a purchaser could buy and be protected against outstanding claims.

A party purchasing before that period had expired would not be a bona fide purchaser.

In other words, the Iroquois Transportation Company, when it made the last payment on its contract for the steamer, must be held to have made the payment with knowledge of the existing law, and with knowledge of the fact that under Section 10832 any parties furnishing materials, labor, etc., in connection with the construction of the ship, would be entitled to enforce their liens as against the Iroquois Transportation Company. The Iroquois Transportation Company had made, in July, 1903, its final payment on the contract for building, and with knowledge of the fact that under Section 10832 all material men could come in and claim liens against the ship.

It is in evidence that this final payment was made, and no security taken to protect the company against the outstanding liens.

The proofs are strangely silent as to what was said by the officers of the Iroquois Transportation Company and the Columbia Iron Works with reference to outstanding liens.

The proofs are likewise silent on the question of whether or not the Iroquois Transportation Company made any inquiry regarding such claims, and no direct statement appears in the record intimating that the Iroquois Transportation Company did not know every outstanding claim against the ship when the final payment was made.

There is not a suggestion in the record that the officers of the Iroquois Transportation Company, who were present at the yards of the Columbia Iron Works for several days before the ship was turned over to them, could not have had full access to the Columbia Iron Works's books, or that they could not have known if, as a matter of fact, they did not actually know, just what claims were outstanding.

The mere unsupplemented fact that the officers of the Iroquois Transportation Company, some ten days before the failure of the Columbia Iron Works, visited the plant of the Columbia Iron Works and stayed there for several days, and until they arranged for the turning over of the *Winnebago* to them in an uncompleted condition, points strongly to some indication of knowledge of the financial affairs of the Columbia Iron Works on the part of the officers of the Iroquois Transportation Company.

When this fact is supplemented by the further fact that the officials of the Iroquois Transportation Company do not offer a word of proof as to what knowledge they had of outstanding liens when the ship was turned over to them, it is clear that the Iroquois Transportation Company is not before the court as a bona fide purchaser for value without notice.

"A bona fide purchaser is one who takes the property for value, in good faith, and without notice of the adverse interest sought to be enforced against him. All these elements must be present."

24 *Am. & Eng. Encly. of Law, 2nd Ed., page* 1169.

Barnard vs. Campbell, 58 *N. Y.,* 73; 17 *Am. Rep,.* 208.

It is also the rule that the taking of personal property in payment of pre-existing indebtedness does not, as a general rule, make the purchaser a bona fide purchaser, as he is not considered to have parted with value, and if the purchaser is deprived of the property, he is in no worse condition than before his purchase.

McGraw vs. Solomon, 83 *Mich.,* 442.

To constitute one a bona fide purchaser, he must have made his purchase without notice of the adverse interest sought to be enforced against him.

Read vs. Horner, 90 *Mich.,* 152.

24 *Am. & Eng. Encly. of Law, 2nd Ed., page* 1174.

Notice is to be distinguished from knowledge, and if the buyer has notice of facts which would put a reasonably prudent man upon inquiry which would have resulted in the ascertainment of the adverse interest sought to be enforced against him, he will be deemed to have taken with notice, and cannot assert the rights of a bona fide purchaser.

Read vs. Gannon, 50 *N. Y.,* 345;

Allen vs. McCalla, 25 *Iowa,* 464; 96 *Am. Dec.,* 56.

In *Hough vs. Dickinson,* 58 Mich., 89, at page 94, the Court says:

"It is generally established that knowledge of facts sufficient to put an ordinarily prudent man on inquiry is all that is required," etc.

See also

Bedford vs. Penny, 58 *Mich.,* 424-428.

TO SUMMARIZE:

When the Iroquois Transportation Company first parted with payments on the contract, it had or was chargeable with notice of building liens ahead.

It continued to make payments, chargeable with such knowledge of building liens ahead.

It made its final payment, chargeable with knowledge of outstanding liens.

There is not a syllable of proof in the record that it did not have actual and full knowledge of the amount of every outstanding lien. It certainly had the facility of obtaining this information, as its officers were present at the yards of the Columbia Iron Works several days before the ship was turned over to their company in an uncompleted condition.

The Iroquois Transportation Company was, therefore, chargeable with the knowledge of the existence of these claims.

The substance of the statute has been complied with, because the Iroquois Transportation Company was given notice within a month, and the complaints were filed about two months after the ship was turned over to them.

The defense, under Section 10832, was not raised in the pleadings, and had it been raised, then there would have been the greater part of a year to have complied with the statute, if, in fact, complainant had not already complied. The point was not raised by plaintiff in error until after the year had expired. The equities are not with plaintiff in error. The defense not having been raised in the pleadings or brought up until after the appeal had been perfected, no proofs were taken to show

whether or not complainant had failed to comply literally with the statute, and plaintiff in error, while claiming to be a bona fide purchaser, did not raise any defense that called upon respondent to put in proofs on the question of complying with Section 10832.

It is submitted, however, that it was not intended that this complaint be filed in the county where the party claiming the lien resides in all cases. The DeLaney Forge & Iron Company, the complainant here, was a resident of Buffalo, and it could not have obtained service by filing its complaint there. The purpose of the Act, as stated, was to bring timely notice to a purchaser, and to provide for the timely enforcement of the claim, which was done, and to file a claim at Buffalo would have given no notice to defendant; it would have served no purpose.

The equities are strongly with the defendant in error. The Iroquois Transportation Company paid its contract price chargeable with full knowledge of the existing liens, and there is not a syllable of proof in the record that the Iroquois Transportation Company did not have actual knowledge of every outstanding lien, and it certainly had the facilities for getting such information, through its close association with the Columbia Iron Works.

The Circuit Judge found that the equities were strongly in favor of the complainant. He says (R., p. 101):

> "The Iroquois Transportation Company contracted with the Columbia Iron Works, and took this vessel before it was fully completed, but even though they had awaited until its entire completion, under the statute they took it subject to whatever claims were against it. The facts here are, though, that they took it hurriedly, before it was finally completed. I will not review the cases cited, touching a buyer in good faith in a case of this nature, and will say that the equities point strongly to a lien on the ship."

The Supreme Court of the State of Michigan evidently considered the proposition concluded when they denied the leave to amend to set up the new defense, as, although the matter was fully argued in the briefs before that court, they make no express reference to the point as affecting in any way the general case.

UNDER POINT III.

Under this head, the brief for plaintiff in error discusses one subdivision or phase of the federal question that is before this court.

Under this subdivision the brief discusses a number of well-settled cases dealing entirely with maritime contracts, and it is argued, from separate parts of these several decisions, that the proceeding here trenches upon the exclusive jurisdiction of the federal courts.

The case of The Glide, 167 U. S., 606, quoted from at page 17 of brief for plaintiff in error, is a case that was brought under the Massachusetts statute, and was for labor performed and materials furnished in *repairing the Glide;* as the court will note, a case involving a distinctly *maritime* contract as distinguished from a *non-maritime* contract. At page 620 of this authority quoted by counsel for plaintiff in error, Mr. Justice Gray recognizes the jurisdiction of the State courts in non-maritime matters, where he says:

> "At the same term, a process *in rem* to enforce a lien given by a statute of New Jersey for building a ship was held to be within the jurisdiction of the courts of the State, solely because, as previously adjudged by this court, a contract for building a ship was not a maritime contract, but a contract made on land and to be performed on land, and therefore not a subject of admiralty jurisdiction. Edwards vs. Elliott, 21 Wall., 532, 553, 556; The Jefferson, 20 How., 393; The Capitol, 22 How., 129.

"Likewise in Johnson vs. Chicago & Pacific Elevator Co., decided at October term, 1886, the remedy given by the statute of Illinois was *in personam*, and the cause of action was not a maritime tort, but an injury done by a steam tug to a building on land, of which an admiralty court of the United States would have no jurisdiction; and, as was said by Mr. Justice Blatchford in delivering judgment:

"'This being so, no reason exists why the remedy for the wrong should not be pursued in the State court, according to the statutory method prescribed by the law of the State, even though that law gives a lien on the vessel. The cases in which State statutes have been held void by this court, to the extent in which they authorized suits in rem against vessels, because they gave to the State courts admiralty jurisdiction, were *only cases* where the causes of action were cognizable in the admiralty.'"

The case of The Roanoke, 189 U. S., 185, relied on by counsel for plaintiff in error, is a case brought under the Washington statute, and the proceeding was in rem for materials, work and labor furnished in *repairing* the steamship *Roanoke;* the case involving a distinctly *maritime* contract, as distinguished from the *non-maritime* contract in the case at bar. The court there finds the Washington statute unconstitutional, dealing, as it does, with this maritime matter, in so far as the statute attempted to control the administraion of the admiralty law by creating and superadding conditions, etc. *The Roanoke*, it is submitted, is no authority for holding any similar statute unconstitutional, except insofar as those statutes attempt to control maritime matters.

While we do not regard it as material, as a matter of fact, the proceeding here against the *Winnebago* is the same in substance as the proceeding taken under the statute in Johnson vs. Chicago & Pacific Elevator Co., supra. A warrant was issued in the case at bar against the owner's representative in charge of the ship, as well as a writ against the ship itself, substantially the same

as in the case quoted from. No actual seizure was made, but service was accepted and bond given.

Another of the authorities referred to by counsel for plaintiff in error is the case of Perry vs. Haynes, reported under the name of The Robert W. Parsons, 191 U. S., 17.

The principal question in that case was as to whether or not the Parsons, being a small canal-boat without steam or other power, was a subject of admiralty jurisdiction. The court reviewed the question fully, and concluded that the craft was a subject of admiralty jurisdiction. The proceeding was brought under the New York statute, asking recovery under a contract for *repairs* to the canal boat. When the court had once determined the question of the character of the boat, it will be seen at once that the contract under which recovery was claimed was a *maritime* contract, and that, therefore, the proceeding which was attempted to be brought against the craft under the New York statute on the theory that she was not a thing of admiralty cognizance, was held not proper. The New York statute, insofar as it attempted to enforce a lien against a ship in connection with a maritime contract, was held to be unconstitutional.

The quotation made from *The Robert W. Parsons* in counsel's brief, at page 21, where the court states that the statute "partakes of all the essential features of an admiralty proceeding in rem, of which exclusive jurisdiction, etc., is given to the District Courts," was clearly referring to the exclusive jurisdiction in admiralty and maritime matters, because the court said, in an earlier part of its opinion, what it has recognized so frequently in all its pronouncements, at page 25, as follows:

> "It is equally well established that for causes of action not cognizable in admiralty, either in rem or in personam, the States may not only grant

liens, but may provide remedies for their enforcement. Contracts for the building of a ship are the most prominent examples of such as are not maritime in their character, and hence within this rule," citing,

The Jefferson, 20 *How.*, 393;
The Capitol, 22 *How.*, 129;
Edwards vs. Elliott, 21 *Wall.*, 532;
Johnson vs. Chicago & Pacific Elevator Co., 119 *U. S.*, 388;
Shepard vs. Steele, 43 *N. Y.*, 52.

Another contention urged in the brief for plaintiff in error, under this subdivision, is the contention that the Act here proceeded under is surely in some respects unconstitutional. In the several particulars referred to at pages 18, 19 and 20 of said brief, if it be conceded that these provisions are in conflict with the Constitution and laws of the United States, still, in what manner does that aid plaintiff in error, or affect the case at bar?

The contention of defendant in error is that, even if the Statute is unconstitutional in some respects, it is constitutional and valid, insofar as it relates to the claims in controversy here, and the part being dealt with in this controversy is not so related in substance, and the provisions are not so interdependent that one cannot operate without the other. Under such circumstances, the part that is constitutional will, under all the authorities, stand.

6 *Am. & Eng. Encyl. of Law*, 2*nd Ed.*, *p.* 1088, *and cases;*
Keokuk Co. vs. Keokuk, 95 *U. S.*, 80;
Unity vs. Burrage, 103 *U. S.*, 447-459.

It may be true that the effect of the statute, even where it attempts to enforce a lien on a non-maritime contract, would be to shut off maritime liens if the vessel went to sale. But the issues here are not burdened with that

question. It cannot, in this case, have the effect of cutting off any maritime liens. The vessel has been bonded, and her owner has appeared in the action. Then, again, the fact that the act, in case of a sale, assumes to distribute the proceeds and marshal the claims in an order not accepted in the admiralty court, does not affect the case at bar, even though it may be unconstitutional in that regard.

As was said by Circuit Judge Severns, in *The Winnebago,* 141 Fed., 945, at page 950; 73 C. C. A., 295, at page 300:

> "It is further suggested that she might become subject to maritime liens which could only be enforced in the admiralty, which may also be conceded. We are unable to perceive that any relevant consequence ensues upon the fact that the vessel had engaged in interstate commerce, and the fact that she might become subject to maritime liens would not destroy liens already lawfully acquired. It is true she might become subject to maritime liens which would be superior to the existing lien, and that such liens would have to be enforced in the admiralty. But that possibility does not defeat the enforcement by a State court of the non-maritime lien to which she is subject. How else is the owner of the latter to obtain his remedy? It may be the vessel will never become subject to maritime liens at all; and, if so, the holder of the existing lien may never have even the privilege of proving his claim in some cause instituted for another purpose. But no such supposed embarrassment has yet occurred. And they are as yet imaginary. But suppose such other liens should attach? That should not prevent the enforcement of the earlier lien in the proper court. If the holder of the earlier lien delays his action, he subjects himself to the danger of superior liens becoming fastened, and the enforcement of his own lien in the State court must leave the vessel subject to the superior liens of which the State court cannot take cognizance. If occasion requires, and the admiralty court enforces the superior liens, it is in no wise obstructed by the action of the State court, and the title under a decree of the former court would defeat the title

gained under the decree of the State Court. The case of Moran vs. Sturgis, 154 U. S., 256, 14 Sup. Ct. 1019, 38 L. Ed., 981, is a good illustration of this subject. There is no difficulty other than such as may happen in case one court should take and have possession of the vessel at a time when the other should require it; but that is an incident common along all the lines of concurrent proceedings in the state and federal courts, and gives no ground for the denial of jurisdiction to either."

UNDER POINT IV.

Discussion of the matters referred to in brief for plaintiff in error under Point IV. would seem to be profitless. If the point stated were accepted as true, it would avail nothing to plaintiff in error.

The Supreme Court of the State of Michigan (R., 144-145) said:

> "It cannot with accuracy be said that materials furnished as in this case, where a statute of a State gives a non-maritime lien, are furnished upon the credit of the vessel. Such language is only exact where reference is had to a maritime lien.
>
> "The statutory lien attaches by operation of law, where the materials furnished are within the provisions of the statute. The lien attaches as an incident to the contract, and unless such lien is waived, the provisions of the statute may be invoked for its enforcement."

This finding of the Supreme Court of the State of Michigan will not be disturbed by this court.

Ashley vs. Ryan, 153 *U. S.*, 456.

The elaborate discussion, therefore, on the subject of what other States hold regarding peculiar lien statutes of their own, is scarcely material here.

Insofar as the statements of fact in brief for plaintiff in error under Point IV. are concerned, it is only relev-

ant, perhaps, to note that the Supreme Court of the State (R., 144-145) found the facts, as well as the law, in favor of defendant in error.

This court will not review the decision of the State court upon these matters of fact.

Dower vs. Richards, 161 *U. S.,* 458.
Egan vs. Hart, 165 *U. S.,* 188.
Bement vs. National Harrow Co., 186 *U. S.,* 70-83.

The United States Circuit Court of Appeals for the Sixth Circuit, in The Winnebago, 141 U. S., 945, at page 950, 73 C. C. A., 295, at p. 300, construes the State statute in the same way that the Michigan Supreme Court construes it, and says:

> "The statute declares a lien in favor of the party furnishing material for the building of the ship. But it does not contemplate that credit shall not be given to the owner, or that he shall not be liable personally for the debt. It is possible, no doubt, for the furnisher to waive the lien; but, unless he does so, the lien exists. The burden of showing the waiver rests upon the party who alleges it."

UNDER POINT V.

In the brief for plaintiff in error, page 36, the fact is shown that in the schedule attached to the DeLaney Forge & Iron Company's bill of complaint (R., pp. 3 and 4) four items, aggregating $184.72, were furnished after the ship was launched. *The Winnebago* was launched March 21st, 1903.

The claim is made that for these materials which were furnished subsequent to the launching of the *Winnebago*, no remedy exists here, for the reason, as is stated in the said brief for plaintiff in error (p. 37), that the lien could be enforced in admiralty.

The claim of defendant in error on this point is, that so long as the materials were to be used as part of the original construction of the ship, the admiralty would not take cognizance of them.

In *The Iosco,* Bro. Adm., 495, Fed. Cas. 7,060, a hull completed at the place of launching received a small cargo of flour as ballast, was towed with her spars on deck to another port, where her masts were stepped, and the vessel put in condition for navigation. *Held*: that the work was done in building the vessel, and that admiralty had no jurisdiction.

In that case, decided in the United States District Court for the Eastern District of Michigan, Judge Longyear said:

> "Whether the claim of libelants arises out of a maritime contract, and whether they have a right of action in this court in rem, depends upon the question of fact whether what libelants did and furnished were to and for a vessel already in existence, or whether they were so done and furnished in part to bring her into existence as a complete thing. If the former, then the action will lie. If the latter, it will not lie, and this court has no jurisdiction. It was so settled fully and definitely by the Supreme Court in December term, 1857, in the case of People's Ferry Company vs. Beers, 20 Howard (61 U. S.), 393, and reaffirmed in December, 1859, in the case of Roach vs. Chapman, 22 Howard (63 U. S.), 129. In the mind of the court, there is no room for doubt or discussion as to the question of fact. What libelants did and furnished were clearly by way of completing the construction of the vessel, and constituted in no sense within the meaning of the maritime law, repairs and materials for which by that law an action in rem will lie. It makes no difference that the vessel was in the water. It is always the case that a portion of the construction of a vessel is done after she has been put in the water."

The above case, recognized in the District where the case at bar is pending as the law, has been quoted from

with approval by other courts. The points came up directly in The Victorian, 24 Oregon, 121, at pages 132-3-4-5, where the court said:

> "It is true that contracts relating to commerce and navigation are classed as maritime contracts; but the simple fact that an incomplete or unfinished vessel has been launched into the water when a contract relating to her completion is made, in no way fixes or determines its character. In such case the work performed or the material furnished is in constructing the boat or vessel, and to bring her into existence as a complete entity. There is a marked difference between furnishing materials to a vessel already in existence and furnishing them to bring one into existence. The latter are for her construction, and the contract is not maritime. The idea is that the vessel, when completed, will be used for maritime purposes, but until then she is in the process of construction—a structure under State control—and a claim for materials furnished, though she may be afloat, is not a maritime, but a land, contract. The fact, therefore, that the work was done, or the material furnished, after the vessel was launched, does not per se, as the cases show, render the contract maritime. In Wilson vs. Lawrence, 82 N. Y., 411, the vessel was launched before it was completed, and thereafter the plaintiff contracted to furnish her with sails, as a part of and to complete the work of construction. The question was whether the furnishing of sails after launching was a land contract, or one purely maritime. The court held that it was a land contract, and that the lien attached. Finch, J., said: 'It is doubtless true that, before launching, the contracts for construction are more easily and strongly shown to be land contracts, but no case holds that the work of building or constructing a vessel cannot proceed after the launch. Indeed, no case could hold that, for it is purely a question of fact. A vessel may be unfinished when launched, and the work of building may be unfinished when she is in the water.' * * * In Roach vs. Chapman, 22 How., 129, the court held that 'a contract for building a ship, or supplying engines, timber, or other material for her construction, is clearly not a maritime contract.' If an engine is an essential part of the construction

of a vessel propelled by steam, why are not the sails an essential part of the construction of a sailing vessel? Is the ship without these necessary aids any more built or constructed in the one case than the other? * * * We are satisfied that the contract in this case was a land contract, and that the lien attached.' In McDonald vs. The Nimbus, 137 Mass., 360, Field, J., said: 'The facts show that the materials furnished in this case were furnished in the construction of the vessel. She was not so far constructed as to be fitted for sea, and used as a commercial vessel, after her arrival in Gloucester.' Baizley vs. The Odorilla, 121 Pa. St., 233 (1 L. R. A., 505; 15 Atl. Rep., 521).

(Then follows a reference to the Iosco and a quotation in which Judge Longyear's language is quoted with approval.)

"In The Count De Lesseps, 17 Fed. Rep., 461, the claim was for materials, consisting of a derrick, buckets and other dredging machinery furnished at Philadelphia after the vessel had been towed from New Jersey, where she had been built, to fit out the vessel for an intended voyage to Panama, and it was held that they were furnished in the original construction of the boat; The Pacific, 9 Fed. Rep., 124; Gollins vs. Coernine, 7 Am. Law Reg., 5; Smith vs. The Royal George, 1 Woods, 293; The Norway, 3 Ben., 163. These cases show that a claim for work done, or materials furnished, in the building or original construction of a vessel is not a maritime contract, and that admiralty has no jurisdiction. The claims are not maritime when they are for original construction or equipment, whether or not the boat has been launched. It is the usual mode in the building of steamers, to build the hull, and to place the engines, boilers and machinery in it after the launching, so as to avoid the additional weight of the machinery in the process of launching. When the work done, or the material furnished, is used in the construction of the vessel, and to bring her into existence as an entity, the claim does not arise out of a maritime contract, and it is competent for the State courts to enforce it by a proceeding in rem."

The dicta in Globe Iron Works vs. Ketchum, 100 Mich., 583, to the effect that after a vessel is launched contracts for equipment or materials or repairs are maritime, it will be noted, refers to *contracts made* after launching, and proceeds on the mistaken theory that the admiralty courts will take cognizance of all contracts made after launching as maritime contracts. * * * It is no authority for the suggestion, which appears in brief for plaintiff in error, that there can be no lien for materials put aboard after the ship was launched, if they were contracted for before the launching.

In the case of Edwards, et al., the proof is (R., 110) that the windlass, capstan and reversing engines were furnished on February 11, 1903, more than a month before the launching. If the dicta in the *Ketchum* case on the question of what are maritime contracts were good law, this would not affect the item of windlass, capstan, etc., for the reason that the contracts for the equipment were made a month before the launching. It is the law, however, that, for all materials furnished as part of the original construction there is a lien enforceable here, whether the contracts for same were made after the launching or before.

In the case of The Winnebago, 141 Fed. Rep., 945, at page 951, 73 C. C. A., 295, at p. 301, Circuit Judge Severens says:

> "A ship launched but still in the course of construction does not become subject to the maritime law because she rests in the water rather than on land, and does not become so until she is put into use as an agency of commerce; or, at least, until she is fitted for that purpose, and she ceases to possess a maritime character when she is permanently withdrawn from such service."

Citing:

> *City of Detroit vs. Grummond,* 121 *Fed.,* 963, 971; 58 *C. C. A.,* 301.

UNDER POINT "VI."

Under this head of the brief for plaintiff in error, the proposition is contended for that the Steamer *Winnebago,* engaged in interstate commerce, was not subject to seizure while passing from port to port through the waters within the jurisdiction of the Courts of the State of Michigan.

Two facts should be borne in mind in this connection:

(A) It is not correct to say that the *Winnebago* was seized in this proceeding. Instead, the fact is that a bond was given without seizure.

(B) It does not appear in the record that the *Winnebago* was, at the time the complaint was filed or service accepted, engaged in interstate commerce. On some of her voyages it does appear that she loaded or unloaded cargo at ports in the State of Michigan.

Even if there had been seizure in this case, and if it were shown that the *Winnebago* was engaged in interstate commerce at the time appearance was asked or service accepted, it is submitted that the whole trend of judicial authority, as evidenced by the references above made, is to the effect that the State here had complete power to make and enforce the law here made and enforced, insofar as it relates to the *non-maritime* matter here under discussion, and that its enforcement is not a regulation of commerce.

In the case of Smith vs. The State of Maryland, 18 How., page 71, at page 74, the Court says:

> "It was argued that it is repugnant to that clause of the constitution which confers on Congress power to regulate commerce, because it authorizes the seizure, detention and forfeiture of a vessel enrolled and licensed for the coasting trade, under the laws of the United States, while engaged in that trade.

> "But such enrollment and license confer no immunity from the operation of valid laws of a State. If a vessel of the United States, engaged in commerce between two States, be interrupted therein by a law of a State, the question arises *whether the State had power to make the law by force of which the voyage was interrupted.* This question must be decided, in each case, upon its own facts. If it be found, as in Gibbon vs. Ogden, 9 Wheat., 1, that the State had not power to make the law, under which a vessel of the United States was prevented from prosecuting its voyage, then the prevention is unlawful, and the proceedings under the law invalid. But a State may make valid laws for the seizure of vessels of the United States. Such, among others, are quarantine and health laws."

In the case of Johnson vs. Chicago & Pacific Elevator Company, 119 U. S., 388, at page 398, the Court says:

> "In Taylor vs. Carryl, 20 How., 583, this Court upheld the validity of the seizure of a vessel under a process of foreign attachment issuing from a State Court of Pennsylvania, in pursuance of a statute of that State, as against a subsequent attempt to seize her under process in admiralty. In the course of the opinion of the Court, delivered by Mr. Justice Campbell, it is said:
>
> " 'The process of foreign attachment has been for a long time in use in Pennsylvania, and its operation is well defined by statute as well as judicial precedents. The habit of courts of common law has been to deal with ships as personal property, subject, in the main, like other personal property, to municipal authority, and liable to their remedial process of attachment and execution; and the titles to them, or contracts and torts relating to them, are cognizable in those courts.' "

And again, on page 399, the Court said:

> "There being no lien on the tug by the maritime law for the injury on land, inflicted in this case, the State could create such a lien therefor as it deemed expedient, and could enact reasonable rules for its enforcement, not amounting to a regulation of commerce. Liens under State statutes

> enforceable by attachment in suits in personam are of every-day occurrence, and may even extend to liens on vessels when the proceedings to enforce them do not amount to admiralty proceedings in rem, or otherwise conflict with the Constitution of the United States. * * * This disposes of the objection that the vessel, being engaged in commerce among the States and enrolled and licensed therefor, no lien on her could be enforced by attachment in the State court. The proceeding to enforce the lien in this case was not such a regulation of commerce among the States as to be invalid, because an interference with the exclusive authority of Congress to regulate such commerce, any more than regulations by a State of the rates of wharfage for vessels, and of remedies to recover wharfage, not amounting to a duty of tonnage, are such an interference, because the vessels are engaged in interstate commerce," citing,
>
> *Cannon vs. New Orleans,* 20 *Wall.,* 577, 582;
> *Packett Co. vs. Catlettsburg,* 105 *U. S.,* 559;
> *Trans. Co. vs. Parkersburg,* 107 *U. S.,* 691.

The cases cited at page 40 of brief for plaintiff in error deal with railway transportation. Service was in the case at bar accepted and bond given without seizure, and without prejudice, but nothing appears to show that at the time the vessel was bonded she was not bound for some point within this State. The cases referred to have no bearing on the controversy here. As is said in Connery vs. Quincy, etc., Railway Company, 99 Northwestern, 365; 64 L. R. A., 624, at page 626:

> "The Federal government has expressly required that the movement of railway cars shall not be stopped or delayed at the point where the lines of such railway companies cross the borders of states, or at the point where the carriers deliver the cars to the next connecting carriers; but that shipments will go forward from the originating point to their destination in the cars in which they are first loaded. U. S. Rev. Stat., 5258 (U. S. Comp. St., 1901, p. 3564)."

The Supreme Court of the State of Michigan in passing on this point in the case at bar, say (Record 145):

> "The question to be determined in each case is whether the State had the power to make the law under which the proceeding is instituted. If such power existed, vessels of the United States may be subjected to process issued from State Courts to enforce a valid lien in proceedings under such law. In this respect the law of the State is valid, and the proceedings taken under it regular."

This doctrine accords with the pronouncements of this Court, as shown in the case of Smith vs. The State of Maryland, 18 How., 71, at page 74.

In the Circuit Court of Appeals for the Sixth Circuit, deciding the case of the *Winnebago,* 141 Fed., 945, at page 950, and 73 C. C. A., 295, at page 300 (which case it will be remembered arose at the same time with the case at bar, and against the same boat, and has the same plaintiff in error, and is in all respects practically identical with the case at bar), the Court says:

> "We are unable to perceive that any relevant consequence ensues upon the fact that the vessel had engaged in interstate commerce."

In the *Winnebago* case just referred to, after conclusion in the Circuit Court of Appeals, petition for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit was filed and the writ denied by this Court. This case is No. 512 in the October, 1905, term, entitled: The Iroquois Transportation Company, Etc., Petitioner, vs. A. Harvey's Sons Manufacturing Company, decided December 18, 1905. The memorandum covering same decision is noted in 200 U. S., 616.

In the case of Knapp, Etc., Co. vs. McCaffrey, 177 U. S., page 638, Mr. Justice Brown reviews from the Constitution down the question of admiralty jurisdiction, the exclusive character of it, etc., etc., in the District Courts, and after commenting upon The Moses Taylor, 4 Wall., 411; The Hine vs. Trevor, 4 Wall., 555; The Belfast, 7 Wall., 624; The Lottawanna, 21 Wall., 558;

The J. E. Rumbell, 148 U. S., 11; The Glide, 167 U. S., 606, and Moran vs. Sturges, 154 U. S. 256, and at page 642 says:

> "The rule to be deduced from these cases, so far as they are pertinent to the one under consideration, is this: That wherever any lien is given by a State statute for a cause of action cognizable in admiralty, either in rem or in personam, proceedings in rem to enforce such lien are within the exclusive jurisdiction of the admiralty courts.
>
> "But the converse of this proposition is equally true, that if a lien upon a vessel be created for a claim over which a court of admiralty has no jurisdiction in any form, such lien may be enforced in the courts of the State. Thus, as the admiralty jurisdiction does not extend to a contract for building a vessel, or to work done or materials furnished in its construction (The *Jefferson*, People's Ferry Co. vs. Beers, 20 Howard, 393; The *Capitol*, Roach vs. Chapman, 22 How., 129) we held in Edwards vs. Elliott, 21 Wall., 532, that in respect to such contracts it was competent for the States to enact such laws as their legislatures might deem just and expedient, and to provide for their enforcement in rem."

UNDER POINT VII.

(Mistakenly referred to as VI. at p. 41, in brief for plaintiff in error.)

Point VII. of brief filed for plaintiff in error contends for the proposition that the contract to build a ship is a maritime contract, and therefore there is a lien for material and labor furnished which can be enforced in a court of admiralty, there being a lien under the State law.

The last fifty pages of brief for plaintiff in error treats on the above question. The question discussed under that point really forms the basis of the entire defense.

The discussion of this point in brief for plaintiff in error treats exhaustively of the subject in an historical way, and details at considerable length what the law of the maritime codes of the various foreign countries are.

The law in this country on this subject is so thoroughly well settled and has been acquiesced in and accepted as having a sound basis for so many years that it would seem to be unnecessarily consuming the time of this Court to again detail the sound reasons for allowing the well established rule of this Court to stand. The reasons stated in Edwards vs. Elliott, 21 Wallace, 532-553, show clearly the soundness of the doctrine of this Court.

It is readily seen that the line must be drawn somewhere, between contracts regarded as maritime and those not to be so regarded, and where conceivably could it be drawn in a more reasonable place than it is at present under the rule which refuses to treat as maritime contracts those which do not concern a finished instrument of commerce, or which do not pertain to navigation.

There is not and cannot be the same necessity for so-called uniformity in building contracts that there may be for national or international features of shipping, as, for instance, rules respecting the navigation of vessels, and relating to collisions, average, questions between ship owner and shippers, and other questions that may become important at any time at home or abroad with any ship or merchant. In those matters there is in reason a necessity for as much uniformity as can be reasonably brought about, but in relation to the building of a vessel these conditions do not exist. The work is done on land, the work is local, and contracts relating to her are necessarily local, and all details in connection with the contract for building are matters regarding which the parties have the local law in mind when they contract.

The proposition has very recently been before this Court, to-wit: No. 339, on the docket of the present Octo-

ber term, 1906. The point was very exhaustively discussed in that case by counsel for the plaintiff in error here. The case is entitled The Graham & Morton Transportation Company, Appellant, vs. The Craig Ship Building Company, Appellee, and was an appeal from the District Court of the United States for the Northern District of Illinois. This Court affirmed without opinion the decree of the District Court of the United States for the Northern District of Illinois, which dismissed the libel filed therein on the ground that the cause of action therein, which grew out of a contract for building a ship, did not arise out of a maritime contract.

In conclusion it is submitted that the decree of the Supreme Court of the State of Michigan should be affirmed, with interest and costs.

Respectfully submitted,

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Detroit February, 1907.

FILE COPY.

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1906.

No. 219.

Office Supreme Court, U. S.
FILED
FEB 25 1907
JAMES H. McKENNEY
Clerk

IROQUOIS TRANSPORTATION COMPANY, claimant of the Steamer Winnebago, etc.,
Plaintiff in Error,
vs.
GEORGE W. EDWARDS, etc., co-partners as H. D. Edwards & Company,
Defendant in Error.

Error to the Supreme Court of Michigan.

BRIEF FOR DEFENDANT IN ERROR.

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DETROIT:
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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1906.

No. 219.

IROQUOIS TRANSPORTATION COMPANY, claimant of the Steamer Winnebago, etc.,
Plaintiff in Error,
vs.
GEORGE W. EDWARDS, etc., co-partners as H. D. Edwards & Company,
Defendant in Error.

Error to the Supreme Court of Michigan.

BRIEF FOR DEFENDANT IN ERROR.

This is an intervening petition in the case of the DeLaney Forge & Iron Company against the Steamer Winnebago, namely: case No. 218, October term, 1906.

This case is practically identical with No. 218, and the same brief therefore is submitted as covering the intervening claim, and we therefore refer to the points in Brief in No. 218 as presenting the contentions of defendant in error here.

For the reasons therein stated the decision of the Supreme Court of the State of Michigan should be affirmed with interest and costs.

Respectfully submitted,

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Detroit February, 1907.

Supreme Court of the United States.

Nos. 218 and 219.—October Term, 1906.

Iroquois Transportation Company, Claimant of the Steamer "Winnebago," &c., Plaintiff in Error,
218
vs.
De Laney Forge and Iron Company.

Iroquois Transportation Company, Claimant of the Steamer "Winnebago," &c., Plaintiff in Error,
219
vs.
George W. Edwards, Frank W. Eddy, and George W. Edwards, Executor of the Estate of H. D. Edwards, deceased, copartners as H. D. Edwards & Company.

In error to the Supreme Court of the State of Michigan.

[April 8, 1907.]

These cases may be considered together. They are writs of error to the judgments of the Supreme Court of Michigan affirming the decrees of the Circuit Court of Wayne County, Michigan, enforcing liens for the De Laney Forge and Iron Company, defendant in error, in 218, and George W. Edwards and others, defendants in error in 219, and intervenors in the original case.

The Winnebago, a steel steamer of 1,091 tons burthen, was built by the Columbia Iron Works, at St. Clair, Michigan. The contract price was $95,000; date of contract, March 8, 1902; between the Columbia Iron Works and John J. Boland and Thomas J. Prindeville. It was understood that these persons should organize a corporation to be known as the Iroquois Transportation Company. The contract price was to be paid, $31,000 in cash, from time to time; for the balance the transportation company was to execute its notes to the amount of $16,000, to issue bonds for $48,000, to be secured by mortgage upon its property. On April 5, 1902, Boland and Prindeville assigned the contract to the Iroquois Transportation Company. Payments were made on the contract as follows:

$7,500, at date of signing contract;
7,500, April 3, 1902;
4,000, April 14, 1902;
4,000, June 15, 1902;
4,000, July 15, 1902.

An additional $4,000 was paid on October 3, 1902, and two negotiable notes of $4,000 given, maturing respectively November 1, 1903, and November 1, 1904.

The steamer was launched March 21, 1903. After she was in the water the work on the contract continued. On July 18, 1903, she was inspected, measured, enrolled and licensed to be employed in domestic and foreign trade. This license was issued in the name of the Columbia Iron Works as owner.

On July 19, 1903, the Iroquois Transportation Company received a bill of sale of the steamer and delivered to the Columbia Iron Works ninety-six negotiable bonds of $500 each, secured by mortgage on the steamer, and paid the balance of the purchase money, which was to be paid in cash, then amounting between $400 and $500.

The agreement recited that possession was given to the Iroquois Transportation Company for the purpose of completing and finishing up those things still remaining undone on the steamer and required to be done by the iron works by the terms of the contract for the construction of the steamer, "it being the sole intent and purpose of this agreement to enable the Iroquois Transportation Company to obtain immediate possession of the steamer, and without intending either to limit the extent of the obligation of said Columbia Iron Works under the original specifications."

The steamer left St. Clair for Lorain, Ohio, July 19, 1903. At that time she was not completed, and workmen remained on her and went with her to St. Clair, where additional work was done upon her. She was afterwards engaged in carrying cargoes between points on Lake Erie and Lake Superior.

On July 30, 1903, the Columbia Iron Works made an assignment for the benefit of creditors. On August 25, 1903, the De Laney Forge and Iron Company served notice on the Iroquois Transportation Company that it made a claim of lien against the steamer for forging and material furnished; and on October 6, 1903, complaint was filed in the Circuit Court of Wayne County, Michigan, and shortly thereafter Edwards and others intervened in the case, claiming a lien. The Iroquois Company gave a bond under the statute for the release of the vessel. Decrees were rendered in favor of the claimants and intervenors in the Circuit Court of Wayne County, and upon appeal they were affirmed in the Supreme Court of Michigan. 142 Michigan, 84.

Mr. Justice DAY delivered the opinion of the Court.

The Michigan statute, under which the liens are claimed in this case, is as as follows:

"Third Compiled Laws of Michigan, p. 3254:

"(10789) Sec. 2. Every water craft of above five tons burthen, used or intended to be used, in navigating the waters of this State, shall be subject to a lien thereon:

"First, for all debts contracted by the owner or part owner, master, clerk, agent or steward of such craft, on account of supplies and provisions furnished for the use of said water craft, on account of work done or services rendered, on board of such craft, by seamen, or any employe, other than the master thereof; on account of work done or service rendered by any person in or about the loading or unloading of said water craft; on account of work done or materials furnished by mechanics, tradesmen, or others, in or about the building, repairing, fitting, furnishing or equipping such craft: *Provided*, That when labor shall be performed or materials furnished, as aforesaid, by a subcontractor or workman other than an original contractor, and the same is not paid for, said person or persons may give the owner or his agent, or the master or clerk of said craft, timely notice of his or their said claim, and from thenceforth said persons or persons shall have a lien upon said craft *pro rata* for his or their said claims, to the amount that may be due by said owner to said original contractor for work or labor then done on said water craft."

Several objections are urged by the plaintiff in error which, if sustained, will result in the reversal of the judgments of the Supreme Court of Michigan. Some of them are of a non-federal character. It is insisted that the statute does not apply in this case, because the steamer Winnebago was not to be used in navigating the waters of Michigan, within the terms of the statute. But this only presents a question of state law, upon which the judgment of the State court is final and conclusive. The same may be said as to the objection because the transportation company was a *bona fide* purchaser without notice of complainant's lien, and because complainant did not within a year file its claim for a lien with the proper court in the county in which it resided. These are state questions, likewise concluded by the decision of the State court.

It is further contended that to seize the vessel and subject her to sale and the proceeds thereof to distribution in the State court would be in direct conflict with the exclusive jurisdiction in admiralty in the courts of the United States in favor of liens of a maritime character, and therefore the Michigan act is unconstitutional. No maritime lien is asserted in this case, and it is merely a matter of speculation as to whether any such claim existed, or might be thereafter asserted. No holder of any such maritime lien is here contesting the constitutionality of the State law.

In a case from a State court, this court does not listen to objections of those who do not come within the class whose constitutional rights are alleged to be invaded; or hold a law unconstitutional because, as against the class making no complaint, the law might be so held. This was distinctly ruled in a case decided at this term. *New York ex rel. Hatch* v.

Reardon, 204 U. S. 152. See also *Supervisor* v. *Stanley*, 105 U. S. 305–11; *Lampasas* v. *Bell*, 180 U. S. 276, 283–4; *Clark* v. *Kansas City*, 176 U. S. 114–8; *Cronin* v. *Adams*, 192 U. S. 108–14.

There is no one in position in this case to make this objection, and, for aught that this record discloses, no such maritime lien existed. If this statute is broad enough to include strictly maritime liens, it can only be held unconstitutional, in a case coming from a State court, where the complaint on that ground is made by the holder of such a demand. We agree with Judge Severens, speaking for the Circuit Court of Appeals for the Sixth Circuit, in a case directly involving this question, where other claimants upon the Winnebago had removed a case to the United States Circuit Court for the Eastern District of Michigan, whence it was taken to the Circuit Court of Appeals:

"And the fact that she [the Winnebago] might become subject to maritime liens would not destroy liens already lawfully acquired. It is true she might become subject to maritime liens which would be superior to the existing lien, and that such liens would have to be enforced in the admiralty. But that possibility does not defeat the enforcement by the State court of the non-maritime lien to which she is subject. How else is the owner of the latter to obtain his remedy? It may be the vessel will never become subject to maritime liens at all; and, if so, the holder of the existing lien may never have even the privilege of proving his claim in some cause instituted for another purpose, but no such supposed embarrassment has yet occurred. And they are as yet imaginary. But suppose such other liens should attach. That should not prevent the enforcement of the earlier lien in the proper court. If the holder of the earlier lien delays his action, he subjects himself to the danger of superior liens becoming fastened, and the enforcement of his own lien in the State court must leave the vessel subject to the superior liens of which the State court cannot take cognizance. If occasion requires, and the admiralty court enforces the superior liens, it is in no wise obstructed by the action of the State court, and a title under a decree of the former court would defeat the title gained under the decree of the State court. The case of *Moran* v. *Sturgis*, 154 U. S. 256; 14 Sup. Ct. 1019, 38 L. Ed. 981, is a good illustration of this subject. There is no difficulty other than such as may happen in case one court should take and have possession of the vessel at a time when the other should require it; but that is an incident common along all the lines of concurrent proceedings in the State and Federal courts, and gives no ground for the denial of jurisdiction to either." *The Winnebago*, 73 *C. C. A.* 295.

It is next insisted that the materials and supplies were not furnished on the credit of the vessel, but were contracted for, furnished and delivered on the credit of the Columbia Iron Works.

The findings upon this proposition are again questions within the exclusive jurisdiction of the State court. The findings will not be disturbed here.

It is next objected that the court erred because certain items were allowed for material furnished the vessel after she was launched, and therefore the subject of exclusive jurisdiction for which a lien could only be enforced in the admiralty. But we agree with the State court that these items were really furnished for the completion of the vessel and were fairly a part of her original construction. In such a case the remedy was within the jurisdiction of the State court. *The Iosco*, Federal Cases, 7060; *The Victorian*, 24 Or. 121; *The Winnebago*, 73 C. C. A. 295.

It is urged that the attempt to enforce the lien on the vessel was while she was engaged in interstate commerce, and therefore proceedings against her were unlawful and void, in view of the exclusive control of this subject by Congress under the Constitution and laws of the United States. But it must be remembered that concerning contracts not maritime in their nature, the State has authority to make laws and enforce liens, and it is no valid objection that the enforcement of such laws may prevent or obstruct the prosecution of a voyage of an interstate character. The laws of the States enforcing attachment and execution in cases cognizable in State courts have been sustained and upheld. *Johnson* v. *Chicago & Pacific Elevator Co.*, 119 U. S. 388–98. The State may pass laws enforcing the rights of its citizens which affect interstate commerce but fall short of regulating such commerce in the sense in which the Constitution gives exclusive jurisdiction to Congress. *Sherlock et al.* v. *Alling*, 93 U. S. 99–103; *Kidd* v. *Pearson*, 128 U. S. 1, 23; *Pennsylvania R. R. Co.* v. *Hughes*, 191 U. S. 477.

Upon the subject, Mr. Justice Brown, speaking for the court in *Knapp* v. *McCaffery*, 177 U. S. 638–642, said:

"That wherever any lien is given by a State statute for a cause of action cognizable in admiralty, either *in rem* or *in personam*, proceedings *in rem* to enforce such lien are within the exclusive jurisdiction of the admiralty courts.

"But the converse of this proposition is equally true, that if a lien upon a vessel be created for a claim over which a court of admiralty has no jurisdiction in any form, such lien may be enforced in the courts of the State. Thus, as the admiralty jurisdiction does not extend to a contract for building a vessel, or to work done or materials furnished in the construction, (*The Jefferson, People's Ferry Co.* v. *Beers*, 20 How. 393; *The Capitol, Roach* v. *Chapman*, 22 How. 129,) we held in *Edwards* v. *Elliott*, 21 Wall. 532, that in respect to such contracts it was competent for the States to enact such laws as their legislatures might deem just and expedient, and to provide for their enforcement *in rem*."

The contract in this case being for the construction of a vessel, and its enforcement within the power and jurisdiction of the State courts, we do not think that execution of such a decree can be avoided because the vessel engaged in interstate commerce.

Finally, an elaborate and able argument is made in support of the contention that a contract to build a ship is a maritime contract, and therefore can be enforced only in admiralty, but as late as this term, in *Graham* v. *Morton Transportation Company*, this contention was overruled upon the authority of the previous decisions of this court. 203 U. S. 577.

The judgments of the Supreme Court of Michigan are

Affirmed.

True copy.

Test:

Clerk Supreme Court, U. S.